American Bar Association

This Month's Cover

On our cover this month are the features of Napoleon Bonaparte, the great French general and statesman who became Napoleon I of France. In spite of his military victories, Napoleon's contribution to the law, the famous Napoleonic Code, has proved to be of far greater value to his countrymen and to the world. The line drawing of Napoleon is by Charles W. Moser, of Chicago.

August, 1957

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1155 East 60th Street, Chicago 37, Illinois.
Entered as second class matter August 25, 1920, at the Post Office at Chicago, Illinois, under the act of August 24, 1912.
Price per copy, 75¢; to Members, 50¢; per year, $5.00; to Members, $2.50; to Students in Law Schools, $3.00;
to Members of the American Law Student Association, $1.50.
Vol. 43, No. 8. Changes of address must reach the JOURNAL office five weeks in advance of the next issue date. Be sure to give both old and new addresses.

published monthly

American Bar Association Journal

the official organ of the American Bar Association

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral and Natural Resources Law; Municipal Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $5.00; Criminal Law, $2.00; Insurance, Negligence and Compensation Law, $5.00; International and Comparative Law, $5.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral and Natural Resources Law, $5.00; Municipal Law, $3.00; Patent, Trademark and Copyright Law, $5.00; Public Utility Law, $3.00; Real Property, Probate and Trust Law, $5.00; Taxation, $5.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois.

American Bar Association

HEADQUARTERS OFFICE:
1155 EAST 60th STREET, CHICAGO 37, ILLINOIS. Telephone: HYde Park 3-0533
WASHINGTON OFFICE:
1025 CONNECTICUT AVENUE, N. W., WASHINGTON 6, D. C.
Telephone: MEtropolitan 8-6124

Officers and Board of Governors 1957-58

President CHARLES S. RHYNE, 839 17th Street, N. W., Washington 6, D. C.
Chairman, House of Delegates
Secretary JOSEPH D. CALHOUN, 218 West Front Street, Media, Pennsylvania
Treasurer HAROLD H. BREDELL,Consolidated Building, Indianapolis 4, Indiana
Executive Director JOSEPH D. STECHER, 1155 East 60th Street, Chicago 37, Illinois

Ex Officio
- The President,
- The Chairman of the House of Delegates,
- The Secretary,
- The Treasurer,
- DAVID F. MAXWELL, Last Retiring President, Packard Building, Philadelphia 2, Pennsylvania
- TAPPAN GREGORY, Editor-in-Chief, *American Bar Association Journal*, 105 South LaSalle Street, Chicago 3, Illinois

First Circuit	WILLOUGHBY A. COLBY, 18 School Street, Concord, New Hampshire	*Sixth Circuit*	GLENN M. COULTER, Ford Building, Detroit 26, Michigan
Second Circuit	WHITNEY NORTH SEYMOUR, 120 Broadway, New York 5, New York	*Seventh Circuit*	GEORGE S. GEFFS, Jackman Building, Janesville, Wisconsin
Third Circuit	VINCENT P. MCDEVITT, 1000 Chestnut Street, Philadelphia 5, Pennsylvania	*Eighth Circuit*	RICHMOND C. COBURN, 411 North Seventh Street, St. Louis 1, Missouri
*Fourth Circuit**	DOUGLAS MCKAY, Barringer Building, Columbia 1, South Carolina	*Ninth Circuit*	JOHN SHAW FIELD, 15 West Second Street, Box 1291, Reno, Nevada
Fifth Circuit	JOHN C. SATTERFIELD, Box 1172, Jackson, Mississippi	*Tenth Circuit*	FRANKLIN RITER, Kearns Building, Salt Lake City 1, Utah

**The District of Columbia Circuit is considered a part of the Fourth Circuit for the purposes of the Board of Governors.*

Board of Editors, American Bar Association Journal, listed on page 720

Advisory Board of the Journal

CUTHBERT S. BALDWIN	New Orleans, Louisiana
PHILIP R. BANGS	Grand Forks, North Dakota
STEPHEN W. BOWEN	Tucumcari, New Mexico
GEORGE E. BRAND	Detroit, Michigan
CLAUDE E. CHALFANT	Hutchinson, Kansas
WALTER CHANDLER	Memphis, Tennessee
HOWARD COCKRILL	Little Rock, Arkansas
LELAND M. CUMMINGS	Salt Lake City, Utah
JOSEPH J. DANIELS	Indianapolis, Indiana
DEANE C. DAVIS	Montpelier, Vermont
JOHN A. DIENNER	Chicago, Illinois
JAMES M. DOUGLAS	St. Louis, Missouri
FRANCES CRAIGHEAD DWYER	Atlanta, Georgia
WILLIAM W. EVANS	Paterson, New Jersey
JAMES D. FELLERS	Oklahoma City, Oklahoma
JOHN SHAW FIELD	Reno, Nevada
DONALD A. FINKBEINER	Toledo, Ohio
P. WARREN GREEN	Wilmington, Delaware
JOSEPH W. HENDERSON	Philadelphia, Pennsylvania
FRANK L. HINCKLEY	Providence, Rhode Island
WILLIAM J. JAMESON	Billings, Montana
NICHOLAS JAUREGUY	Portland, Oregon
J. LANCE LAZONBY	Gainesville, Florida
HUBERT S. LIPSCOMB	Jackson, Mississippi
ORISON S. MARDEN	New York, New York
WALTON J. MCLEOD, JR.	Walterboro, South Carolina
SHACKELFORD MILLER, JR.	Louisville, Kentucky
MORRIS B. MITCHELL	Minneapolis, Minnesota
EDWARD E. MURANE	Casper, Wyoming
FRANK B. OBER	Baltimore, Maryland
CHARLES W. PETTENGILL	Greenwich, Connecticut
ORIE L. PHILLIPS	Denver, Colorado
JOHN D. RANDALL	Cedar Rapids, Iowa
WARREN H. RESH	Madison, Wisconsin
FREDERICK D. G. RIBBLE	Charlottesville, Virginia
CLEMENT F. ROBINSON	Brunswick, Maine
WILLIAM ALFRED ROSE	Birmingham, Alabama
ASHLEY SELLERS	Washington, D. C.
JAMES L. SHEPHERD, JR.	Houston, Texas
E. B. SMITH	Boise, Idaho
REGINALD HEBER SMITH	Boston, Massachusetts
THOMAS TODD	Seattle, Washington
ROBERT W. UPTON	Concord, New Hampshire
MAURICE T. VAN HECKE	Chapel Hill, North Carolina
JOHN J. WILSON	Lincoln, Nebraska
CHARLES C. WISE, JR.	Charleston, West Virginia
CHARLES H. WOODS	Tucson, Arizona
MELVIN T. WOODS	Sioux Falls, South Dakota
LOYD WRIGHT	Los Angeles, California

Views of Our Readers

▪ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.

Compulsory Arbitration Means Speedy Justice

As to Mr. Labrum's article on congested trial calendars [April, 1957, issue, page 311], a recent conference of Pennsylvania judges brought out that there is little congestion in those judicial districts that have compulsory arbitration. Compulsory arbitration is a success in Pennsylvania and is less costly than jury trials.

Judicial districts in Pennsylvania that have directed compulsory arbitration are districts with only one type of judge conducting trials, the common pleas judge.

CHARLES SCOTT WILLIAMS

Judge's Chambers
29th Judicial District
Williamsport, Pennsylvania

But a "Dr." Is Not Always a Debtor

Disapproval is expressed of the suggestion in May's issue by Franklin A. Thayer that members of the Bar be designated as "Counsellor" which he proposes be shortened to "Cr."

No better answer can be given than in these words from the excellent article by Joseph N. Welch in the February-April issue of the *Journal of the American Judicature Society:* "Perhaps the richest word, or the most all-embracing word, and certainly the oldest and simplest, is 'lawyer'. That word encompasses all the others, and designates the wise counsellor, the dependable attorney, the devoted advocate; in it are embraced all the concepts of fidelity and service which make any profession great, and that of the lawyer among the greatest."

Since an abbreviation like "Cr." carries a connotation of "creditor", we hope no one will think that the title of "lawyer" should be shortened to "Lr."

H. SOL. CLARK

Savannah, Georgia

An Infantry Lawyer Answers Mr. Jacques

From the date of the first publication of the Jacques letter, I have fought off entering into the editorial discussion of the "plight" of the lawyer in military service. The last publication (May, 1957) was too much.

When that informed author complains about a "rotten situation", he has displayed a complete lack of knowledge of the system of military justice, as well as any understanding of the need for lawyers, as lawyers, in the military service.

He reveals his true complaint when he again refers to "fancy officers' uniforms". Why not admit, Mr. Jacques, that you have a personal axe to grind—that you didn't get one of those "fancy" uniforms and, because of that fact, you are willing to claim foul play from the Chief of Staff down?

You are not the only person who served as an enlisted man in World War II. You are not the first person whose talents were used in a manner unbefitting his opinion of his own worth. This does not give any support to your theory of a rotten or smelly situation.

When I served as an enlisted man in World War II (Infantry-combat, so you don't misunderstand), I, too, heard the many latrine rumors of drumhead justice. However, I never met anybody who claimed to be the personal victim. Therefore, I have no personal knowledge of abuses.

There were three lawyers in my outfit that were enlisted men; two were privates. One of these finally got a direct Infantry commission. Two successive CO's were lawyers, not doing legal work, but doing their appointed job. None of these complained about abuse or misuse. None of these men rebelled at following orders of their non-lawyer superiors (one of whom was a shipping clerk).

Whatever situation might have existed with reference to military justice in World War II, the law has been changed twice since that time. It is a far cry from "so-called" justice, as you put it. I see no reason to continue the resurrection of the World War II corpse of military justice.

During the Korean War, I was recalled involuntarily and served again in the infantry in one of those fancy officer uniforms (to-wit: fatigues, combat boots, etc.) and later secured a detail to JAGC.

As an Infantry officer, I had occasion to act in the defense of fourteen general courts, I sat as a court member in about twenty trials by special courts, and also served as a summary court officer. Later, in JAGC, I was appellate counsel and handled about sixty general court convictions on review. After that, I was the judge advocate of a major post with initial review of about one hundred assorted convictions.

In my civilian experience, I have defended twenty or thirty felony cases and as a prosecuting attorney have prosecuted more than that. I have also represented enlisted men as civilian counsel before general courts martial.

I recite all this merely to show that I have some knowledge of military service and of the mechanics of criminal justice, both in and out of the military.

(Continued on Page 680)

More and more alert businessmen are now calling upon their attorneys for advice and counsel in discussions concerning financial aspects of their businesses.

We believe that you'll be interested in reading two brief brochures which explain how *factoring*—a specialized form of commercial financing—is solving many credit and financial problems arising from today's competitive conditions.

The first of these brochures, **"Modern Factoring And How It Meets Today's New Financial Requirements,"** is a reprint of one of the most comprehensive analyses ever published on the subject. It originally appeared here in the Journal.

The second brochure, designed for distribution to your clients, discusses factoring in non-technical language. Its title is **"The Protected Profit Program."**

Both of these publications are available without cost or obligation to members of the legal profession. Address your request to Mr. Walter M. Kelly, President, Commercial Factors Corporation, 2 Park Avenue, New York 16, N. Y. MUrray Hill 3-1200, specifying the publications and quantities desired.

(Continued from page 677)

I will not attempt an all inclusive brief on the pros and cons of civil versus military in the field of criminal justice. I will state to you categorically that a military accused has better and more protection of rights than his civilian counterpart. In my military experience, I never had a case where my client got, or even claimed, a "smelly" deal.

Before you go into all this name calling and generalization, don't you think in fairness, you should first check the law and the facts? I can't support your position which is not documented at all. Our civil courts have decided cases unjustly at times, too. I don't believe that makes a "rotten" situation.

Suppose you, in civilian practice, are defending a criminal case. Can you secure a transcript of the grand jury proceedings? Can you be present at the grand jury proceedings? Can you call witnesses before the grand jury? Can you cross-examine the prosecution witnesses in advance of trial? Suppose a prosecution witness, or any witness, in a criminal case, refuses prior to trial to tell you what his testimony will be—what can you do? *Nothing,* I'll venture.

Now, consider Article 32 of the U.C.M.J. (10 U.S.C.A. §832). The military accused can get any and all information against him prior to trial and compel the witnesses to testify in his presence under cross-examination by his own counsel at a formal investigative hearing.

Read Article 31 U.C.M.J. (10 U.S.C.A. §831) on self-incrimination. Do you have any such requirement in your law? I doubt it. Now, read *United States* v. *Wilson and Harvey,* 8 C.M.R. 48, and apply it to your own courts. Suppose, as in that case, a policeman heard a shot and saw a crowd of people. Upon going there, he sees a body on the ground and says: "What happened?" The accused says: "I shot him." Would this statement be admissible against the accused in a trial for the killing? Not in the military, simply because the accused was not explained the meaning of his rights under Article 31 before being asked what happened.

These are only two protections afforded an accused in the military that he cannot find in a civilian court. There are more, and there are technicalities resulting in reversals you never dreamed would be considered in our civilian jurisdiction.

Last year, a friend of mine in Cincinnati was employed as civilian counsel to defend a soldier at Fort Knox. This lawyer has devoted more than thirty-five years of practice to the defense of criminals. He is considered by many to be the outstanding criminal trial lawyer in Ohio. After the court martial, he told me that nothing in the prosecutor's case had not been revealed to him prior to trial. He was amazed at the fairness of the proceedings. His client, though convicted, was given a just sentence. *In toto,* the rumors he had heard about "railroad" justice and "officer club" convictions were pure bunk.

Who are all these non-lawyers doing legal work that you speak about? They aren't involved in military justice any more than non-lawyer J. P. or mayor's courts exercising minor criminal jurisdiction. Look at Articles 26 and 27 of U.C.M.J. to see who is qualified to act as law officer or counsel. Non-lawyers just aren't functioning in the Army in matters other than minor criminal jurisdiction. Ordinarily, these involve purely military offenses, such as A.W.O.L.

Sure, the Army has claims-men who need not be lawyers—so does the insurance industry. There are some procurement officers who are not lawyers, but they don't draft the contracts any more than a real estate agent who fills in the blanks on a purchase and sale agreement. Why, even for simple and free legal assistance to its members, the Army regulations require a lawyer to serve in that function, if one is available.

How many lawyers do you have in your community in ratio to population? One in 500?—one in 700? What does that mean in reference to adult male population? Probably less than one in 200. The Army is authorized 837,000 men in uniform. Can it use *per se* the 4,000 lawyers involved? 2,000 can do the job adequately. Two thousand must do something else.

Certainly a lawyer in the Army wants to do legal work. However, there just aren't enough legal jobs to go around. Each year, the JAGC has needed from 150 to 300 new lawyers. With all the law school graduates per year, many must be disappointed.

The lawyer fresh out of law school has a two-year draft hitch to meet. It takes about six months to train him to be a lawyer-officer because of necessary groundwork in matters military and the teaching of new laws, customs and procedures. Train him and the law-graduate can give the Army eighteen months of service.

Therefore, the Army offers a legal-officer program on a three-year basis. A lot of law graduates do not stand in line for these three-year commis-

(Continued on page 682)

(Continued from page 680)

sions as first lieutenant. When they choose to be drafted as privates for two years, how can they be heard to complain that they are not doing legal work?

Is it unfair for the Army to give their legal jobs to the boys who are willing to stay an extra year? Is it unfair to give these jobs to career legal officers? I say it is not.

So there are lawyers in the military who are not doing legal work. For the most part, they made the choice. The remainder did not rank as high in their graduating class as those selected from the three-year applicants.

Don't we have the same situation in our crowded civilian practice? A lot of my classmates are not practicing law because they could not stand the early years of starvation wages. Many of them have never done directly any legal work at all. The proportion in my class is just about the same as in military service today.

Instead of raising the dead issue of World War II, why not utilize your talents to promoting the current move, supported by the American Bar Association. We are hoping to raise the standard of rank and pay of the military-lawyer to the equivalent of the medical officer. We hope that with this method we can create a strong legal-career program in the Army and thus stop the wasteful turnover of personnel.

By denouncing generals as being "vested interest" boys bent upon crushing the enlisted man, you are not only wrong, but are branding our profession as unworthy of consideration.

Stop jeopardizing the good work being done with a muddy diatribe based on hard feelings and fiction. Let the dead issues rest in peace.

JAMES G. UTRECHT

Troy, Ohio

The Need for Uniform Forms

"To form or not to form," that is the paraphrased salute. So long as we believe that specific forms must implement our codes, there is no gainsaying the value of having each statute or rule embody a clearly drawn form. At both federal and state levels some of this is realized, but not in terms of universal and uniform practices. The battle precipitated by forms rages more at high pitch than not.

But then have we ever inquired as to the probable reason for straitlacing ourselves into forms? Try digging down beneath the outward attitude of unquestioned acceptance of the need for forms. What are the roots like?

It may be that professional training is foreign to actual practice. At least, oft-repeated lamentations assume as much. Do the courts mistrust a practitioner's ability to read a statute expertly enough to prepare papers mindful of substantive and adjective instructions? If such be the situation, our schools fail us.

Examine from another aspect. The court will not undertake to posit an academic resolution. Perforce must we await an actual issue for a form to be delineated. This pragmatism nurtures a mental block which ultimately disintegrates into a mad scramble to adapt blindly all other cases to the precedent. To function unassisted by some existent form has become unthinkable.

Forms, like pagan spirits, will multiply. They reflect every professional hazard that someone may have had to overcome. Fearsome intimidation by the voodoo *stare decisis* has us kotowing to every formulated idol.

With each application becoming a minor *cause célèbre,* it is depressing to find the court engaging in a pedantic emasculation and revision of a proposed form which the presumptively schooled draftsman undertook to present to "teacher" for approval.

What faith do the courts have in the calibre of their attachés? Matching a proposed document against the vast array of legal cap already approved can be a mere mechanical skill. Beyond that, is there a place for personnel? A negative response would demand that less qualified and proportionately lower salaried individuals be inducted into service. Actually, our attachés are relied upon as being far more capable than mere perfunctories.

Do attorneys work from the form or the rules? Given arbitrary circumstances, legal practitioners do, first off, search for a set of forms. When advised that the paper proffered doesn't comply with statute, they then undertake to read the law and to adjust their form accordingly. This is not an improprietous putting of the cart before the horse. It is a natural confluence of complemental factors—ill-defined demands for form, pressure of time, superficial similarity of causes, statutory incoherence, professional inadequacy. Sadly enough, the importance of the form has superseded the respect for the rule it is intended to effectuate.

Does the court expect that a substantially original form be screened by court attachés as being in essence a compliance with fiat? Such intelligent identification would convict petty arbitrary conformity as being a debilitating offense. Civic efficiency could then concentrate on recruiting a small corps of skilled responsible analysts still subordinate to the duly constituted judiciary. Presently, actual operative requirements see the court seeking more rather than fewer personnel. In the main, the skills of the categories sought are not too clearly defined. Still, this lack of definition has not prevented the enlistment of highly qualified employees.

Are there too many detailed regulations? In ordinary course, apposite forms proliferate. Consternation in this reference contrives to weaken resolutions against taking the path of least resistance. And that path leads but to the form—printed.

Our current *modus operandi* will not stem the tide of new rules. Furthermore, it is not gaited to forestall progressively complicated societal relationships. Perhaps the lawyer has too little time left in his working day to ascertain whether

he has met all adjective requirements. Disinterest may also prevail. Assuredly then, the form becomes the catalyst.

Can we arbitrarily make broad excisions from the great mass of existing regulations? Is it possible to salvage, not merely a standardized form, but a standardized set of rules resilient enough to accommodate any procedural monstrosity calling for momentary recognition? Not likely! Again, that necessitates a reorientation in the professional approach as stimulated by training and practice. Further, it predicates the need for court personnel whose skills must match those of this "new" Bar.

At times, midst a plethora of forms we desperately latch on to one of them. In finding no favor at court we thereby experience a dissatisfying way of confirming our own original diffidence. With no rule to cover a novel situation, the dogged attempt to shanghai an unwilling form for uncharted waters engenders judicial mutiny.

Has the form acquired a vested status as a fundamental time and labor saver? Is it humanly impossible or impractical to ignore the need for a form for every proposition? Consideration of our general level of intelligence and intellectual urge is warranted. Are they fixed beneath the threshold of a greater break-through?

These questions are essentially rhetorical. No need to pussy-foot. Let the court itself print up every conceivable form to be issued as accompaniment to its pronunciamentos. Whether the form shall be available without charge or included within the services covered by the purchase of a county clerk's index number for each action or proceeding is meanwhile of passing moment.

Instead of court clerks, employ court form librarians trained to decode a Dewey decimal system within which every faceted form would sport a code number for ready reference. The court itself would be

(Continued on page 705)

The Selection of Federal Judges:

The Work of the Federal Judiciary Committee

by Edward J. Fox, Jr. *of the Pennsylvania Bar (Easton)*

The efforts of the organized Bar to secure good judges is one of the greatest services of the profession to the public. Because lawyers are the only group of citizens that are in daily contact with the courts, they are the only group that are really able to judge the qualifications necessary for good judicial material. Mr. Fox describes the work of the Association's Committee on Federal Judiciary, which, by working with the Attorney General and the Senate Committee on the Judiciary, is doing at the national level what many state and local bar associations are doing at other governmental levels to make certain that American justice continues to be ably administered.

Every year a number of articles are written about the selection of judges. This is a subject which properly demands the constant and thoughtful attention of all members of the Bar. The American Bar Association has long recognized its importance. For example in 1938, the Committee on Judicial Selection and Tenure reported that: "1. Of the great problems facing the profession that of the judicial personnel comes first."

Nothing has happened since then to change that sound conclusion, but the blunt fact is that as long as human beings are essential parts of the formula for selecting judges, no infallible solution can be found. However, much can and is being done by the Association to insure the selection of independent and able judges through its Standing Committee on Federal Judiciary.

Unfortunately only a small fraction of the members of the Association can have the experience of serving on one of its Committees. As a consequence, it may be of interest to see what one of its Committees attempts to do and some of the difficulties it faces.

Article X, Section 7 (k) of the by-laws provides for a Standing Committee on Federal Judiciary as follows:

> This committee shall have power, on behalf of the Association, to promote the nomination and confirmation of competent persons for appointment as judges of the courts of the United States and to oppose the nomination and confirmation of persons deemed by it to be not sufficiently qualified. It shall have power also to report to the House of Delegates or the Board of Governors on any questions relating to the behavior of Judges of such courts and any matters relating to the sufficiency of the numbers of Federal Judiciary.

I hasten to say that I do not speak for the present Committee. I had the good fortune to serve on the Committee for six years but my term ended in August of 1955. Necessarily most of my knowledge was gained prior to that date.

In order to have a clear understanding of the way in which the Committee functions, something of its history must be understood.

In 1945, for the first time, a Special Committee on Federal Judiciary broke ground for the Association in attempting to influence the selection of federal judges. At that time, when a vacancy existed, there was no way in which the organized Bar could present its recommendation for the vacancy to anyone in authority. The Special Committee undertook to canvass the district where a vacancy existed and then suggest various names to the Attorney General for appointment, but before the Committee had an opportunity to complete its canvass and make its recommendation, those in authority had usually agreed on an appointee and made the nomination. As a practical matter, therefore, the only time at which the Bar could be heard was after the nomination had been made. Any member of the Bar could then appear before the Senate Committee on the Judiciary when it was considering the confirmation of the nominee and either urge or attempt to defeat confirmation.

The Special Committee did notable work in establishing a cordial

relationship with the Senate Committee and in presenting its recommendations. Its work was so well done and so effective that it held out much promise for the future.

In 1949 the Committee was made a Standing Committee. It continued to function over the same pattern set by the Special Committee and despite the almost overwhelming odds it, too, met with gratifying success.

During the last six months of the Truman Administration, the Committee through its Chairman, Howard F. Burns, of Cleveland, made a notable advance in its relations with the Department of Justice. This was done through the high-minded and non-partisan approach of Deputy Attorney General Ross Malone and with the full co-operation of Attorney General McGranery.

Mr. Burns and Deputy Attorney General Malone made an arrangement whereby all persons who were under sufficiently serious consideration for the office of judge to have an FBI report made on them would also have their names submitted to the Standing Committee on Federal Judiciary for a report on their professional qualifications. A similar arrangement was reached under the Eisenhower Administration with Attorney General Brownell and Deputy Attorney General Rogers. However there was a slight modification in the functioning of the Committee at that point. It decided to forgo the suggestion of names for vacancies and give its undivided effort to the investigation of the names submitted to it by the Attorney General. This change in procedure was suggested by the Attorney General. It was not forced on the Committee in any way. The change was agreed to by the full Committee and after a trial period it decided to continue this policy in the belief that it was the best way to accomplish its result. This decision puts the Committee in a totally objective position. Except on rare occasions, the Committee has always had ample time to complete its investigation and make its report to the Attorney General before the Attorney General made a recommendation to the President.

When a judicial vacancy occurs, literally scores of names are submitted to the Attorney General by persons seeking the appointment. Names are sent to him by ambitious individuals, hopeful friends, influential friends and on many occasions—and quite properly and logically—by bar associations. After he has culled out what he considers to be the best names, the Attorney General submits the top name or names for investigation to the FBI and to the Committee on Federal Judiciary.

Partisian Politics . . . *A Continuing Problem*

It is no secret that high on the list of advisers of the Attorney General are the members of the Senate from the party of the President. Obviously the Senate contains members who are not of that party. If neither Senator is a member of the party in power, the state chairman, after consultation with any members of the House from his state may submit names. Occasionally the Attorney General may recommend a name that is submitted from what may be called an "outside source" but it is administratively difficult to ignore the names submitted by a Senator of his party and hope to have the nominee confirmed. This is because it has become traditional—in fact it is spoken of as a senatorial prerogative —for a Senator to pick the nominee for the federal Bench. If a person nominated by the President is not one of those originally recommended by the Senator from the state in which the vacancy exists, he may find himself in an extremely unenviable position.

When a nomination is sent to the Senate it is referred to the Committee on the Judiciary for its recommendation and the Clerk of the Committee notifies the Senators from the state of the nominee that the nomination has been made. This is done by a blue slip or form asking the Senators for their opinion of and any information they may have regarding the nominee. Under a rule of the Committee, if no answer is received within one week, approval is assumed. If the slip is not returned, the Clerk of the Committee, despite its rule, inquires of the Senator whether the slip has been received. If a Senator has the slip but says that he is investigating the qualifications of the nominee, the hearing is usually continued to enable the Senator to complete his investigation.

In the absence of strong, clear and disqualifying evidence the nominee is generally recommended for confirmation if the Senator approves. If the slip is not returned, it becomes the task of the nominee and his supporters and his uncles and his cousins and his aunts to get the slip returned to the Committee, for if there is no blue slip in the file the chances are that there will be no judge.

Two Republican Senators from Pennsylvania failed to return their slips pending the "investigation" of a nominee. This investigation delayed the confirmation of a man nominated by President Eisenhower for well over one year.

An even more devastating way to block a nomination is to have a Senator say that the nominee is "personally obnoxious" to him. If such a statement is made by a Senator from the state of the nominee, senatorial courtesy prescribes that the other ninety-five Senators refuse confirmation. This procedure was followed by a Democratic Senator from Illinois and also by a Democratic Senator from Iowa thus blocking the confirmation of two judges nominated by President Truman.

Senators have supported their position by arguing that they know the capabilities and characters of judges and lawyers in their own state better than the President who, however excellent his intentions, necessarily cannot know the Bench and Bar of forty-eight states. This is the premise on which the Senators have built the custom of recommending names for judicial vacancies.

The Constitution, however, lays

on the President the duty of choosing the nominee for judge. In spite of this mandate, the original choice seems to me to lie almost wholly in the hands of the Senators or, if no Senator can be consulted, in the hands of the chairman of the state committee.

The real vice of the situation is that the office of judge is considered political patronage and as such is still a part of the spoils system.

How far this present method of selecting judges has departed from the intention of the original framers of the Constitution appears in No. LXVI of *The Federalist*. Hamilton is discussing the competence of the Senate to act as a court of impeachment. It had been suggested that it would not be proper for the Senate to sit as judges to impeach a person whose appointment it had previously approved. Hamilton pointed out, however, that:

> It will be the office of the President to *nominate*, and with the advice and consent of the Senate to *appoint*. There will of course be no exertion of *choice*, on the part of the Senate. They may defeat one choice of the executive, and oblige him to make another; but they cannot themselves *choose* . . . they can only ratify or reject the choice he may have made. They might even entertain a preference to some other person, at the very moment they were assenting to the one proposed; because there might be no positive ground of opposition to him; and they could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favorite, or upon any other person in their estimation more meritorious than the one rejected. Thus it could hardly happen, that the majority of the Senate would feel any other complacency toward the object of an appointment, than such as the appearances of merit might inspire, and proofs of the want of it destroy. [*italics emphasis by Hamilton*].

It must never be assumed that Senators do not have as high standards for the federal Bench as the members of the American Bar Association. Perhaps they are conditioned differently by what they see and what many others do not see. For instance, over the last fifty years, appointments to the federal Bench have been made from the party of the President in well over 90 per cent of the cases. No magic results from the use of a fifty-year span. Judges have come from the party of the President at least as far back as the time of John Adams and his "midnight judges". Nevertheless, it is a little hard to see why, in principle, during a certain four-year period, only Democrats are appointed to the Bench and during another four-year period only Republicans are appointed. Political tags do not belong on judges.

Perhaps it is natural to suggest for a judicial vacancy either a good friend or some one who has rendered valuable service to the party. While I personally deplore such an attitude, if the appointee has the necessary professional qualifications and he is the free choice of the President, little real harm is done. However, service to the party or friendship with a Senator is not of itself enough to qualify a man for appointment to the federal Bench. Fortunately, most of the Senators recognize this. Some of them do not. This occasional lapse furnishes one of the reasons why the services of this Committee are so important to the Bench and to the Bar and to the public.

The Committee's Work . . . *Method of Screening*

The Committee is composed of eleven members, one from each Circuit. When a name is submitted to the Chairman of the Committee by the Attorney General, the name is promptly transmitted to the person in the appropriate Circuit whose duty it is to investigate the qualifications of the person under consideration. When the information is collected the member sends a detailed report and recommendation to the Committee with the request that the members send their votes to the Chairman promptly. At times members of the Committee from outside the Circuit have sources of information which they consider reliable and they supplement the investigation being made.

Fabian Bachrach

Edward J. Fox, Jr., was graduated from the Law School of the University of Pennsylvania in 1923 and was admitted to the Pennsylvania Bar in the same year. A former President of the Pennsylvania Bar Association, he was Chairman of that association's committee to promote the "Pennsylvania plan" of judicial selection from 1948 to 1951.

It is a uniform rule of the Committee that all officers and directors of the Association who might be expected to know the persons under consideration as well as members of the House of Delegates from the district or circuit in which the vacancy exists are asked for their opinion. The members themselves have their own additional sources of information in their own district as well as in their circuit and inquiry is made from these sources. Investigation is not limited to members of the Bar. On several occasions during the last two years of my term, members of the Committee traveled hundreds of miles for personal interviews with persons under consideration and those favoring or opposing their nomination.

All communications with members of the Committee are in the strictest confidence. Names of the informants are not even given to the other members of the Committee unless permission is first obtained.

It sometimes happens that while the Committee and the FBI are investigating, rumors of an impending appointment leak out. Here the Committee meets a serious obstacle. Members of the Bar have been known to say "this man isn't qualified but he is going to be appointed. I have to live with him and represent clients before him and I won't say anything against him." At times the Committee has received a glowing endorsement of the man under investigation with a note at the bottom "cc Mr. Candidate". Purported assistance of this sort is of no help to the Committee.

Members of the Bar can make one of their greatest contributions toward the attainment of a strong Bench by wholehearted co-operation with the Committee. If the person under investigation lacks the necessary qualifications, he must be sidetracked either at the Attorney General's office or before the Senate Committee. It is easier to do it before the Attorney General, but in either event it must be done by information furnished by those who practice with the candidate and know him best. Fearless judges seldom come from a timid Bar and if the Bar is unwilling to speak, an unqualified person may be appointed.

Attorney General Brownell stated publicly that judges would be chosen from among those members of the Bar who were "the best qualified men available" for appointment and so when the votes are in, the Committee reports to the Attorney General that in its opinion the person under investigation either is or is not among those best qualified for the office.

The Committee is obliged to recognize however that no positive test or formula can be applied to a person to determine in advance whether he will be a good judge. It expresses its opinion to the Attorney General and in turn it must recognize the right of the Attorney General to differ with its opinion.

If the investigation is not conducted properly or if the case is not stated persuasively and objectively and supported by credible evidence, the fault lies with the Committee and the members of the Bar. If, on those few occasions when the Attorney General and the Committee disagree and the nomination is made, the Committee, *i.e.* the Bar, still has an opportunity to be heard before the Committee on the Judiciary of the Senate.

Here the Committee again files a report on each nomination. It may say that in its opinion the nominee is qualified. This report is based on a standard different from its report to the Attorney General. A man may be qualified to be judge even if he does not come from that small group considered "the best qualified men available". Honesty, however, requires the Committee to report him qualified.

The Committee may also report that it will neither recommend nor oppose confirmation. This can mean that members of the Bar have not expressed their opinion of the nominee with sufficient unanimity to enable the Committee to form a recommendation.

The Committee may recommend that a nominee not be confirmed. If such a recommendation is made, the Committee cannot safely rest its case on an unfavorable written report to the Senate Committee which is based necessarily on hearsay evidence. No lawyer would be willing to submit an important case on such a record, and what more important case can there be?

Judicial Candidates . . . *Specific Suggestions*

If the Committee reports that a man should not be confirmed, it needs courageous support from the Bar to defeat the nomination. Members of the Bar must be willing to appear before the Senate Committee in the presence of the nominee and his Senator and state frankly and fully why the man is not qualified for appointment. With help of this sort from the Bar, nominations have successfully been opposed by the Committee.

The Deputy Attorney General and the Chairman of the Committee form the contact between the Attorney General and the Committee and this should be a close relationship. To my knowledge it can be a very pleasant one. At times a request is made for a preliminary report on whether a full-scale investigation should be made on some lawyer. Specific suggestions relating to particular phases of the lawyer's life or practice are suggested for investigation and it often happens that if this preliminary investigation turns out badly, nothing further is heard of it.

Statements of Attorneys General and of Deputy Attorneys General to members of the Committee warrant the belief that the opinion of the Committee is valued highly in the Department of Justice and that its services are extremely helpful.

When Senator Patrick J. McCarran was Chairman of the Committee on the Judiciary, the Standing Committee had occasion to appear before it. At the conclusion of the hearing Senator McCarran made a rather lengthy and very gracious statement about the Standing Committee saying ". . . you have on a number of occasions effectively brought about results here" and thanked the Committee for having "done a piece of work that is most unpleasant for you but most useful to us." Other chairmen have made similar comments.

Possibly President Eisenhower had the work of the Committee in mind when he said at Philadelphia in 1955:

> To the officers and members of the American Bar Association I express my grateful acknowledgement of the assistance they have rendered as a public service in aiding me and my trusted advisers in the review of professional qualifications of individuals under consideration for federal judicial positions. You have helped secure judges who I believe will serve in the tradition of John Marshall.

When Chief Justice Vinson died the services of the Committee were offered to the Attorney General but the Committee was told that the appointment of a Justice to the Su-

(Continued on page 761)

A Broad New Field:

Atomic Energy and the Practicing Lawyer

by **Harold P. Green** • *of the District of Columbia Bar*

The average lawyer, like the average layman, probably regards atomic energy with mixed fixed feelings of fear, wonder and hope, but it is unlikely that he has thought of it as a part of his daily routine. The rapid development of peaceful applications of atomic energy make it entirely possible that nuclear power will soon be as familiar as gasoline, and, like so many other technological developments of this century, the new industry will raise legal complications for lawyers and courts to settle. Mr. Green writes not so much of the future, however, as of the present. Atomic energy is a field for lawyers and their clients in 1957, not 1984. The article sets forth the basic problems in the field that lawyers should be familiar with if they are to serve their clients.

The United States is now moving rapidly ahead into the widely heralded "atomic era". Since 1954, when the Atomic Energy Act was rewritten to abandon the government monopoly and to open the door to private enterprise, many elements of the American business community have been positioning themselves for a stake in the atomic future. It is difficult to overestimate the impact which atomic energy will have upon the domestic and world economies within the next several decades. The many varied and substantial applications of atomic energy assure that it will soon become a tremendous and all-pervasive fact of economic life.

It is certain that the next generation will see the investment of billions of dollars of private capital in development and use of civilian applications of atomic energy. Business activity of this magnitude necessarily means the execution of contracts, the creation of business entities, the processing of license applications and countless forms of litigation before judicial and administrative bodies. In short, the growth of atomic energy to these proportions means that the legal profession will be called upon to play a major role in the development of the industry and in handling the myriad problems which this development will engender.

Most members of the legal profession sense that atomic energy is a field with which sooner or later they will have some contact, but few have any real awareness of what the development of atomic energy may mean to their law practices. Lawyers are not alone in this lack of awareness; large segments of the business and industrial worlds are similarly affected. This is due in large part to the fact that the atomic industry was created and grew out of its infancy under conditions of a security-shrouded government monopoly pointed primarily towards military objectives. Businessmen and lawyers have for the most part been exposed to atomic energy only in connection with the Atomic Energy Commission's contract work. In addition, many people have resisted the notion that they could be doing something profitable in the atomic energy industry because of their misconception that the field was so complex that only a "Q"-cleared scientist, engineer or mathematician could comprehend it. As a member of the AEC put it a few years ago, there has been a great tendency "to leave atomic energy to the experts".

Lawyers should become aware of the impact which atomic energy will have upon the jurisprudence with which they are familiar. As the industry develops, many practitioners will become exposed to new problems in the conventional fields of law. For example, lawyers who are concerned with problems of international commerce must sooner or later take cognizance of the special ground-rules for foreign atomic energy activities by American business.[1]

1. For a description of these ground rules see Green, *American Participation in Foreign Atomic Energy Activities: The Statutory Framework*, 1 VILLANOVA L. REV. 9 (1956); Wit, *Some International Aspects of Atomic Power Development*, 21 LAW AND CONTEMP. PROBS. 148 (1956).

Lawyers engaged in practice before state regulatory agencies will be concerned with the special problems of allocating responsibility for regulating atomic energy activities among the federal, state and local governments.[2] AEC security requirements will undoubtedly create novel problems in labor law. Lawyers handling negligence and workmen's compensation claims will find unique problems of proof in cases involving radiation injury. Trial attorneys generally may run into problems of presenting evidence involving classified information which may not be disclosed to the public at large or to persons not appropriately "cleared" for access. But most of these problems are incidental and peripheral, and, in any event, will probably not be felt with any intensity for several years at least. They are, moreover, problems which will appear gradually, and alert practitioners will have little difficulty in adjusting to them.

The Imminent Question . . . *What Should a Lawyer Do*

Of much greater importance and imminence to lawyers at the present time is the question: "What should I be doing now in connection with the growth of atomic energy?" Practicing lawyers can have an important role to play at the present time, primarily in assisting their clients in finding their places in the atomic energy industry.

Lawyers experiencing their first exposure to the Atomic Energy Act of 1954 and to AEC regulations will be surprised and dismayed by the complexity of atomic energy law.[3] The very vocabulary defies comprehension. They will be surprised also by many of the strange characteristics of atomic energy law which distinguish this field from other regulatory systems with which they have some familiarity. They will find that the Atomic Energy Act created a detailed blueprint for government regulation of an industry which had not yet come into being. They will find that the AEC is not only responsible for regulating the industry, but also is responsible for encouraging and subsidizing the industry, and at the same time is itself a major element in the industry as the sole or principal supplier, and the single largest user, of many vital materials and services. Indeed, it is no exaggeration to say that the AEC competes economically with the private enterprises which it regulates and subsidizes. They will find that the AEC is by law the exclusive owner of every bit of the industry's principal fuel, "special nuclear material", and that private industry cannot own, but may only "lease", any such material which it uses or produces. They will find, moreover, that the Atomic Energy Act contains unusual and unusually stringent regulatory provisions necessitated by the extraordinary hazards to health and safety incident to atomic energy activities, by the inextricably intertwined relationships between civilian and military applications, and by the fact that the civilian atomic energy technology rests upon a body of information classified as national defense secrets in the interest of the national security. All of these factors combine to establish the unique and complex dimensions of atomic energy law.

It is in these complexities that the role and the opportunity of the lawyer lie because the business community, comprising his clientele, is far less able than he to find its way through the institutional complexities. Business opportunities in atomic energy are essentially dependent upon the resources of the company and its ability to find an economically promising technological situation. But the existence of these factors cannot be turned to profit unless the company can find an efficient route, through the maze of law and regulations and the pattern of prohibitions and incentives, for availing itself of the opportunity. The complexities of atomic energy law and regulation, coupled with the novelty of the field and the government incentives to spur private development of atomic energy, afford considerable leeway for the development of ingenious arrangements to render feasible programs or proposals which at first glance might appear to be out of the question. The role of the lawyer is, therefore, to know and to understand the technological resources and the objectives of his clients and to chart an optimum course through the complexities. There are few economic endeavors in which business firms are less able to proceed adequately without full and competent legal counsel than in the atomic energy field.

What does all this mean to the practicing attorney who has little knowledge of atomic energy and has never met an atomic energy problem? Opportunity in atomic energy is probably not as remote as he thinks. Some of his clients undoubtedly possess resources and experience for capturing a share of the market for goods and services in the tremendously expanding industry; some other clients will be affected by technological changes stemming from application of atomic energy products and services. Lawyers can and should be able to provide their clients with intelligent counsel when the clients say: "I'm sure there's something in atomic energy for me, but I don't know what it is, how to find out, or where to get started."

The Basic Information . . . *Not Difficult to Acquire*

The basic facts which lawyers should know to answer such questions adequately are not difficult to acquire. What is primarily necessary is some knowledge of the nature of the atomic energy industry, an elementary knowledge of atomic energy law, and the recognition that more specialized technical and legal coun-

2. These problems are discussed in Stason, Estep and Pierce, STATE REGULATION OF ATOMIC ENERGY (1956); Krebs and Hamilton, *The Role of the States in Atomic Development*, 21 LAW AND CONTEMP. PROBS. 182 (1956); and in an address by Robert Lowenstein of the Office of the General Counsel, AEC, delivered on April 16, 1956, at Oklahoma City. CCH ATOMIC ENERGY LAW REPORTER. Paragraph 6657.

3. For an over-all picture of atomic energy law, see Marks and Trowbridge, FRAMEWORK FOR ATOMIC INDUSTRY (1955), or the commentary portion of the CCH ATOMIC ENERGY LAW REPORTER.

sel may become necessary within a short time if the client takes the plunge. It is possible to set forth in non-technical language certain basic facts of atomic energy which may be helpful to the lawyer in evaluating his own possible role.[4]

The basic equipment of the atomic energy industry is the nuclear reactor. A reactor is somewhat like a furnace. Fuel such as uranium is fed into it and burned, resulting in the production of energy. A reactor is important because of what it produces, and in this respect is amazingly utilitarian. Among the products of a reactor are the following, each being present in varying degree depending upon the type of reactor in question:

(1) *Energy in the form of heat.* This energy may be utilized for space heating, for industrial process heat, for electric power or for propulsion. At the present time, it does not appear that reactor energy can be produced at a cost competitive with conventional energy sources in this country, but it can be anticipated that there will be substantial cost reductions which will make nuclear energy competitive within the next few decades. Meanwhile, the Government, eager to spur development for nuclear energy as a matter of national policy, is itself developing and constructing reactors, as well as providing substantial financial incentives or subsidy to induce private development.

(2) *Radiation.* Operation of a reactor may produce substantial quantities of radiation. The radiation is produced in three ways. First of all, operation of a reactor creates a radiation field which may be constructively utilized. Thus, human cancers have been treated by exposure to the direct radiation of a reactor, and this radiation has also been used to alter the characteristics and properties of materials. Secondly, the reactor is capable of making materials exposed to its radiation radioactive, and these radioactive materials have a wide variety of medical, agricultural and industrial applications. Third, the reactor produces radioactive waste material. Disposal of this material in a safe manner poses a very substantial economic problem to the atomic energy industry, and the possibility of utilizing these waste products constructively is an intriguing but yet unresolved prospect.

(3) *Nuclear Fuel.* Reactors are capable of producing fissionable material which may be used either as reactor fuel or for nuclear weapons. Since all such material is under the law owned by the AEC, AEC must pay a "fair price" for production of the material in privately owned reactors.

There are a number of basic types of reactors, each type being designed primarily for one of the particular uses discussed above or for a selected combination of these uses. The most simple reactor is the *research reactor*, which, as the name suggests, is useful primarily for research and education. A second type of reactor is the *"test reactor"* which provides a useful tool for determining the effects of radiation upon materials, and particularly upon materials and components to be used in reactor construction. Few companies will be interested in acquiring a test reactor because of its great cost, although at least one company is planning to build one for its own use and to sell space and time for use of the reactor by others. In addition, it is not unlikely that groups of firms will form co-operative ventures for acquisition and use of such reactors. In any event, firms producing materials for use in situations involving exposure to radiation can learn much from use of a "test reactor", and other firms will be interested in studying the possibility of improving materials and processes through radiation techniques. A third principal reactor type is the *power reactor* designed primarily to produce large quantities of energy, and the fourth type is the *production reactor* designed to produce fissionable material for fuel or weapons use.

All reactors perform more than one of these functions, and it is possible to design reactors which will perform its several functions, each in the desired relative degree. Thus, a power reactor can be designed to produce power, special nuclear material and radioisotopes, all in significant quantity. Such a reactor will probably not produce any of these products with optimum economy, but in certain situations the combination may prove economically attractive. Thus, at least one organization which has advanced plans for building a power reactor, hopes to offset the uncompetitive costs of power production through sale of radiation sources and services. Other companies hope to make nuclear power costs approach competitive levels by offsetting these costs with payments from AEC for production of fissionable material produced incidentally to the production of energy.

A company seeking to invest in a reactor of any kind must have an AEC license. A license is required to

H. T. Garrett

Harold P. Green has been practicing in Washington since 1954. A graduate of the University of Chicago (A.B. 1942, J.D. 1948), he is a member of the Illinois and District of Columbia Bars. From 1950 to 1954, he was in the office of the General Counsel of the Atomic Energy Commission.

4. A much more detailed description may be found in Stason, Estep and Pierce, ATOMIC ENERGY TECHNOLOGY FOR LAWYERS (1956).

transfer, receive, possess, use, import or export any reactor. A construction permit is necessary before construction of a reactor may commence. Operation of a reactor requires fuel, special nuclear material, which must be obtained from the AEC under a license. The persons who actually operate the reactor by manipulating its controls must be licensed. There are few statutory standards for AEC's exercise of these various licensing authorities, and AEC's regulations add little in the way of standards. An application for a reactor license and for the requisite fuel involves complex considerations of financial and technical qualifications and plans, security, and health and safety. The lawyer's talent to marshal and present intricate and complicated facts, as well as his ability to pilot his client smoothly and profitably through a difficult and obscure regulatory maze is extremely useful in this area.

Atomic Industry . . . *The Average Lawyer's Role*

Few lawyers will have clients who have either the need or the financial resources to own a reactor, or even to participate in co-operative ownership of a reactor, at least in the immediate future. Also, not many lawyers will have clients capable of engaging in the business of designing or constructing reactors. But many lawyers have clients who have the capability to make a place for themselves in the mammoth industry which will supply materials, services and equipment necessary for construction or operation of reactors. Such companies may be in a position to design, construct, or supply parts or components of the reactor facility, many of which are unique and involve special reactor materials. Most work of this character can be performed without an AEC license, but some of it will involve access to classified information necessitating an access permit and security clearances. Because of the unique nature of reactor technology a period of intensive study or research and development may be necessary before a company is able to make a contribution in this area, and in this connection various forms of AEC assistance may be available to those who know where and how to find it.

Other organizations may wish to seek a place in atomic energy in the production chain leading from uranium ore to the fuel element which is placed in the reactor to make it operate. Various separate phases of processing, production and fabrication are required before the fuel element is ready for insertion into the reactor, and after the fuel is burned it is necessary to remove the fuel element, reprocess it, and dispose of wastes. The processes involved are essentially in the field of chemistry and metallurgy, and require a knowledge of uranium technology and its economics, some of which is classified. Most activities in this area require an AEC license for possession or use of the material involved, and when the production chain reaches the point at which special nuclear material is involved, a license is required for construction, ownership and operation of the facility in which the material will be processed. The legal situation gets somewhat complicated at this point because of the fact that the special nuclear material being fabricated into a fuel element is owned by the AEC, is leased to the reactor owner who is financially responsible for it, and is fabricated by still another party under contract with the reactor owner, which party must be independently licensed to operate the fabrication facility and to possess the material being fabricated. Again, there is an AEC program of incentives and supports to encourage private enterprise to step into these activities.

The areas of atomic energy opportunity discussed in the preceding paragraphs relate to the construction and operation of nuclear reactors and the industrial activities necessary for their support. There are also countless economic opportunities in the use of what a reactor produces. The major product of a reactor is heat, which can be used directly or converted into electric energy. Once the heat is produced its use is relatively conventional and, in any event, use of such energy affords special opportunities to only a limited number of very large enterprises such as utilities. The use of a reactor for propulsion of vessels, land vehicles and aircraft is another matter. Nuclear propulsion raises many dramatic economic opportunities, although these appear to be somewhat in the future. If the atomic future holds in store the widespread use of nuclear power for propulsion of means of transportation, the entire marine, aircraft, railroad and automotive industries—and their suppliers—will undergo revolutionary change with a reshuffling of old industrial positions and the creation of new opportunities. Each propulsion reactor will require licensing, and movement of the inherently hazardous nuclear-propelled vehicle from place to place will present substantial legal problems. Even though the era of nuclear propulsion of civilian vehicles appears to be quite distant, those companies which visualize a place for themselves in this phase of the atomic energy future cannot put off studying the problems and planning their research and development programs.

Use of radiation or radiation sources produced in operation of a reactor is somewhat less complicated from the standpoint of legal considerations. The principal problem here is that of compliance with AEC health and safety requirements. Persons wishing to utilize the direct radiation from a reactor make their arrangements with the reactor owner, and no license or AEC permission is required. Persons wishing to possess special nuclear material, byproduct material, or source material require either a general or specific AEC license. These radiation applications have a host of intriguing economic possibilities. Radiation and radioactive materials are useful, for example, in the diagnosis and treatment of human and animal ills; in

(Continued on page 759)

The Use of Pretrial and Discovery Rules:

Expedition and Economy in Federal Civil Cases

by Clyde A. Armstrong • *of the Pennsylvania Bar (Pittsburgh)*

The Federal Rules of Civil Procedure, writes Mr. Armstrong, are undeniably successful, and no one wants a return to the technical pleading of the common law. However, he believes that certain Rules—particularly Nos. 26 through 34—are being used in a way that is inconsistent with the stated purpose of the Rules themselves, to provide a "just, speedy, and inexpensive determination of every action". He discusses the problem in this paper which was read at the Annual Judicial Conference of the Third Judicial Circuit at Atlantic City last fall.

By the Act of June, 1934, the Supreme Court of the United States was empowered to prescribe by general rules for the district courts of the United States and for the courts of the District of Columbia the forms of process, writs, pleadings and motions and the practice and procedure in civil actions at law. Upon adoption all conflicting rules and laws were of no further force or effect. The Supreme Court thereupon made an Order appointing an Advisory Committee "to serve without compensaton" and directed the Committee to prepare and submit to the Court a draft of a unified system of general rules for cases in equity and actions at law in the district courts of the United States and for the courts of the District of Columbia. This Committee consisted of outstanding lawyers selected from representative sections of the United States. Its members devoted considerable time to study and research in a conscientious effort to provide a set of rules which would secure "the just, speedy, and inexpensive determination of every action" (Rule 1).

The original Rules went into effect September 16, 1938. As a matter of policy, the Committee has taken the position that the Rules so adopted should be fairly tested through use and experience and that any proposed amendments, supplements or deletions should be considered and studied in the light of such experience. A major re-examination of the Rules was conducted by the Committee from 1942 to 1946, inclusive; and the proposed amendments by the Committee were adopted by the Supreme Court in 1946 and became effective in March, 1948. Members of the Committee and many lawyers and judges were then of the opinion that the Rules were providing a successful and simplified procedural system; that no basic change was called for; and that the proposed amendments should be, and in fact were, limited in scope to correction and clarification. Aside from three other subsequent amendments, limited in character, no further changes were proposed until the report of the Advisory Committee was submitted to the Supreme Court in October, 1955. This report and recommended changes are the result of a study beginning in 1953.

This present discussion, in keeping with the subject, must necessarily be limited to the results of the operation of a few of the Federal Civil Rules. I trust it will not be considered presumptuous on my part because my observations are made with the full realization of the intelligence, competency and background of those who, through untold hours of study and analysis, arrived at conclusions which they believed, and actually had reason to believe, would meet the specific aim of securing "the just, speedy, and inexpensive determination of every action".

Many studies have been made and many articles and comments published concerning the present Rules of Civil Procedure and particularly with reference to the Rules under discussion. In reading many of these articles, I have no little doubt concerning my own ability to add much, if anything, to what already has been said or written. Although historically lawyers have striven to find formulas whereby justice may be realized without needless delay and prohibitive expense, nevertheless lawyers, being human, shy away

from changes in established procedure. Until within recent years their efforts have been devoted more to codification and uniformity of subject law rather than to revision of laws and rules governing procedure. But codification or uniformity alone has not and could not provide simplification in procedural matters. Efforts to attain simplification usually uncover most difficult problems and complications. Although the results of such efforts may appear to be sound in theory, the actual results in practice are something different. Even though a tool may be so designed or may appear to be the ultimate in perfection, nevertheless its true value is determined only through its use. The same is true of the Rules of Civil Procedure.

It is most difficult from reading the Rules, as well as the explanations of their intended use, to say that there is not ample protection against abuse and failure to meet objectives provided for in the Rules themselves. From personal experience and observation and from the reported cases implementing the Rules, we are in a position to appraise, or at least to have opinions concerning the effectiveness of the Rules in providing proper safeguards and in attaining their stated object of a "just, speedy, and inexpensive determination of every action". Therefore, what I have to say in these respects is not actually a criticism of the Rules themselves but more a discussion of the need to correct certain results from their use or the combination of their use with other rules and laws.

This is not an attempt to say how certain of the Rules should be written or rewritten but merely a humble statement of suggestions for serious consideration of remedies for what many lawyers believe are inequities, as well as to provide safeguards against the unnecessary and unusual costs, expenses, wasted time, and wasted effort of the litigants as well as of the courts themselves. That such results were not intended by the Rules Committee is beyond question. That there are inequities and unjustified costs, expenses and wasted time likewise is beyond question. A number of articles have been written by Chief Judge Charles E. Clark of the Second Circuit. In a recent article of his appearing in the *Ohio State Law Journal* (Volume 14, page 241), he states: "The process of judicial interpretation is sure to bring interpretations of the Rules which in process of time mark a departure, usually by slow degrees, from the original intent." Assuming, for the moment, that there are certain inequities and unnecessary waste of money and time, the question of where the remedy or remedies lie is not of importance to this discussion. If remedies are called for, they may lie within the functions of the Rules Committee, within the courts, or within Congress, or within all of them. Once the need is determined, it is not too difficult for lawyers to provide a remedy.

The Rules in Action . . . *Some Practical Results*

We are here concerned primarily with the actual results growing out of the use of Rules 26 to 34, inclusive, and also, to some extent, Rule 36, with respect to the stated purpose of the Rules—that is, to provide a "just, speedy, and inexpensive determination of every action". For the purpose of discussion, it will be helpful to classify civil cases in our federal courts in two separate categories. In the first category we will include negligence and contract cases, sometimes referred to as "private party" cases. Negligence suits represent not only the greater number of cases in this category but by far the greater number of civil cases tried in our federal courts. In the second category we will include suits by the Government under our Antitrust and Fair Trade Practice Acts, treble-damage suits under the antitrust laws, and derivative suits and class actions such as those instituted by stockholders of a corporation. A number of suits in this latter category involve alleged extensive conspiracies or combinations of charges involving, for example, both infringement of patents and conspiracy.

In the first category (the "private party" suits), the taking of depositions, the issuing and answering of interrogatories, the production of records under the discovery rule, or the request for admissions under Rule 36, by comparison with cases in the second category, raise less serious problems with respect to the questions of delay, expenses or wasted effort. The controls provided in these Rules appear to be adequate, and the nature of the actions themselves limit somewhat the taking of depositions or the issuing of interrogatories or the steps involved in discovery. But even in this category I believe it has been demonstrated that defendants are entitled to better safeguards and the courts themselves to a clearer guidance under the pleading Rules (8 and 12), pertinent sections of which, relating to the averments required in a complaint, will be considered later in this discussion.

However, our chief concern with respect to delay, expense and wasted effort arises for the most part out of cases included in our second category. Even though the Rules specifically provide protective measures against abuse, embarrassment and undue annoyance, nevertheless not only our own observations but the reported cases demonstrate the terrific time, expense and effort which can be, and are to a significant extent, the results of the procedure outlined in these Rules. A minor stockholder, for instance, may institute a derivative or representative action by making most general, if not indefinite, claims in a complaint and then require the defendant or defendants to make an exhaustive, expensive and time-consuming research into matters which, in so many cases, have no ultimate materiality or relevancy. Likewise, under general allegations of antitrust violations or conspiracy, corporations, business organizations, or, for that matter, individuals may be, and are, required to search for and secure, if possible, detailed information,

which in many instances covers years of detail. In fact there are cases where the research has had to extend back into the past century; and actions, records and documents (long since deceased, along with the persons having any knowledge of them) are laid out on the table for every possible present-day interpretation.

Lawyers generally are familiar with numerous illustrations of the tremendous expense, effort and time which can be required of parties involved in litigation coming within this category[1]. It cannot truthfully be said that the Rules of Civil Procedure are responsible for having initiated these situations; but the important point is that they have not been corrected, and it seems clearly evident that in many respects the procedure provided for in the Rules has aggravated rather than alleviated them. For example, the most outstanding illustrations of definite need for correction are the antitrust and conspiracy suits. In some of these cases interrogatories numbering in the hundreds, some even printed in book form and singly involving many details, records and documents, have been filed and served. In one case, for example, just one interrogatory out of hundreds served would have required an answer including almost one million items[2]. In another case the interrogatories and answers made a compact stack more than nine inches high[3]. Reference can be made, and has been made, to these antitrust cases in many articles. The Committee report adopted September 26, 1951, by the Judicial Conference of the United States on "Procedure in Antitrust and Other Protracted Cases" lists several of such outstanding cases at pages 2 and 3 thereof, showing the tremendous number of exhibits and pages of testimony involved. In discussing these cases, the Committee stated at page 4:

> . . . Unnecessary consumption of time and energy, delay in disposition of disputes, and enormous expenditures of money are among the vices resulting from the circumstances described, but the principal vice is that such conditions create confusion, magnify uncertainty, multiply the possibilities of error, and otherwise tend to make less certain and less accurate the judicial determination of disputed issues. The latter vices, if permitted to continue to exist, might threaten the judicial process itself in respect to complex controversies.

The first conclusion of this Committee at page 38 of its report is as follows:

> 1. That unnecessary delay, volume of record, and expense in judicial proceedings constitute an obstruction to the administration of justice; that such delay, volume and expense occur in a sufficient number of cases to constitute a serious problem.

In its second conclusion on page 39 the Committee states that the prevention of these conditions "depends upon a fixed determination on the part of judges to prevent them and a firm course of action to that end". That conclusion may be correct, but, nevertheless, in order to have uniformity, it seems to me that only *legislative correction* will provide it and thereby a basis for both a fixed and a uniform determination on the part of our judges.

At this point it seems pertinent to refer to the Government's method of instituting such actions. Despite the sources of information available to it, the Government may, and usually it does, begin such actions by alleging in the most general terms a violation of the antitrust laws or a conspiracy to violate them. It may and it has the right, in following the Rules of Procedure, to require defendants to go through the costly procedure of answering almost endless interrogatories and in producing all types of documents, papers and records to the point where the defendants, aside from the question of merit, are willing in many instances to make any kind of a settlement at almost any price.

Another example of the realistic results of this type of litigation is a recent suit brought in another circuit to recover treble damages under the antitrust laws. A number of corporate defendants were charged with having been engaged in a conspiracy, which, it was alleged, seriously injured the plaintiff. Identical sets of interrogatories in great number and detail were served on each defendant. It was estimated that the amount of research required in attempting to answer these interrogatories and in the taking of depositions cost these defendants upwards of $1,000,000 in expenses alone. Solely because of the threat of further mounting expenses, the defendants collectively then settled for the sum of $75,000, or approximately seven and one-half per cent of their expenses to that date. The defendants, although convinced there was no merit to the case, were willing to settle for what appeared to be a nominal sum in contrast with the expense, the loss of valuable time of personnel, and other factors.

Parry Studio

Clyde A. Armstrong is a graduate of Westminster College (A.B. 1919) and the University of Pittsburgh Law School (LL.B. 1922). He has been engaged in trial work almost continuously since his admission to the Bar in 1922, and has acted as counsel for both plaintiffs and defendants.

Appeasement at Law . . . *Expedient Settlements*

Certainly there are few who will deny the fact that litigation is, and

1. *The Big Case*, 64 HARV. L. REV. 27 (1950).
2. *Zenith Radio Corp. v. Radio Corp. of America*, 106 F. Supp. 561 (U.S.D.C.Del.).
3. *U.S. v. Aluminum Co. of America*, 44 F. Supp. 97, 104 (S.D.N.Y.).

for some time has been, in the umbrella stage of appeasement or compromise, a condition which is in harmony with the spirit of our time. Anyone who merely raises the specter with the many tools available is almost assured of some favorable result. Instead of applying principle, settlement has become a matter of economic expediency. In fact there have been developed even more fertile fields for what are commonly referred to as legalized blackmail or "strike" suits despite provisions for the giving of security for costs and other precautionary measures provided by the Rules or by law. So that I will not be misunderstood, I repeat that I do not contend that all these unfavorable results are due in whole or in great part to the Rules themselves. What I have believed for some time would be at least a substantial remedy, pertains to Rules 8(a) (2) and 12(b) (6), having to do with pleading.

Throughout our legal history it has been a well-established principle of law that the primary burden of proof rests, and should rest, upon the one who asserts the claim. The human tendency to blame "the other fellow" for injuries or loss is one good reason why the burden-of-proof principle has been sound in protecting as much as possible the innocent from improper claims. It is comparatively easy to allege a claim, but it is an entirely different matter to prove it, although the one naturally follows the other. Surely it must be evident now that under the Rules of Civil Procedure the fundamental principle of burden of proof has lost to no little extent its significant importance through many years of trial history. Therefore, I would like to refer in this part of the discussion to Rule 8 (a) (2), which provides that the pleadings shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief", and also to Rule 12 (b) (6), which provides for a motion "to dismiss for failure of the complaint to state a claim on which relief can be granted".

In the great majority of the cases filed the plaintiff alleging damages or injuries as a result of an alleged wrongful act is in a position to know what he contends constituted the wrongful act and the defendant's connection with it. There does not seem to be any sound reason why the complaint should not be considered an important, if not the most important, pleading in a law suit. Where the plaintiff knows, or obviously should know, the circumstances out of which his claim arises, why shouldn't he be required to set them forth specifically in his complaint? Does it make sense to say that a plaintiff should not be required to do initially what he can or should be able to do and which he is required to do ultimately? Does it save time, expense and effort to permit a plaintiff to assert a claim generally because *the defendant*, by interrogatories or depositions or discovery, may require plaintiff to disclose relevant facts which support his general allegations? Is it fair to either the defendant or the court for a plaintiff to conceal important facts, which he obviously should know, while he is given the right to search through the private affairs of the defendant and thus is afforded an opportunity, first, to select and then to adopt *any set of facts* which, by inference or otherwise, might support his general claim?

Under these two sections of Rules 8 and 12, it has been held almost uniformly[4]:

(a) that the plaintiff is entitled to a liberal construction of his complaint and that motions to dismiss should be granted sparingly;

(b) that upon a motion to dismiss for failure to state a claim, the complaint must be examined and appraised in the light most favorable to plaintiff with most, if not all, doubts resolved in his favor; and

(c) that the complaint will not be dismissed if it appears that the plaintiff would be entitled to relief under *any state of facts which could be proved* in support of the claim asserted by him.

All of us know from experience that excerpts can be taken from documents, statements can be taken out of context and so combined with fortuitous circumstances that almost any type of a prima facie case can be made out. Therefore, it seems to me that the above judicial interpretations of these two Rules are responsible to no little extent for the lost time, excessive expense, and wasted effort resulting, first, from the indefinite and general pleading permitted under Rules 8 (a) (2) and 12(b) (6) and, second, from the procedure under Rules 26 to 36, inclusive.

Werner Ilsen in his revised edition (1944) of *Federal Rules of Civil Procedure* quotes at page 193 from the opinion of Judge Leibell in *Lowe* v. *Consolidated Edison Co.*[5] In granting a motion under Rule 12 (e) in an antitrust action, Judge Leibell, with extensive experience in such trials, stated:

> In cases founded upon the Anti-Trust Act which are dependent for final relief upon the conformation of numerous facts to such flexible concepts as monopoly, interstate commerce, restraint of trade, etc., which are of serious and immediate concern to commercial enterprise, I think that the court should require from plaintiffs in their pleading a statement of facts sufficiently complete to mitigate the dangers that might result if these cases proceeded upon the shaky foundation of a vague and somewhat indefinite complaint. United States v. Griffith Amusement Co., D.C., 1 F.R.D 229. (W.D. Okl. 1940). I am, therefore, inclined to consider liberally defendant's request for particulars of plaintiff's claim . . .

Mr. Ilsen on the same page quotes from *Twin Ports Oil Co.* v. *Pure Oil Co.*[6] wherein Judge Leibell's "sensible doctrine" was noted with approval:

> . . . where suits are instituted under the Sherman Anti-Trust Act, and especially where they involve large sums of money and will in all probability consume the time of the court

(Continued on page 765)

4. See, *inter alia*, *Mullen* v. *Fitzsimmons & Connell Dredge & Dock Co.*, 172 F. 2d 601 (7th Cir.), *cert. denied*, 337 U.S. 959 (1949); *Leimer v. State Mutual Life Assurance Co.*, 108 F. 2d 302 (8th Cir. 1940); *Christo* v. *United States*, 83 F. Supp. 960 (E.D.Pa. 1949); *Gray* v. *Schoonmaker*, 30 F. Supp. 1019 (E.D.Ill. 1940); 2 MOORE'S FEDERAL PRACTICE, para. 8. 34, 12.08 (1948; supp. 1955).

5. 1 F.R.D. 559 (S.D.N.Y. 1940).

6. 46 F. Supp. 149 (D.Minn. 1942).

Justice Behind the Iron Curtain:

Polish Lawyers Fight for the Criminally Accused

by Harry H. Semmes • *of the District of Columbia Bar*

Mr. Semmes writes that the lawyers of Poland have taken the initiative to breathe new life into a system of justice virtually enslaved by the Communist tyranny that followed the "liberation" of Poland by the Soviet Army in 1946. He cites the Poznan trials as examples of the new legal policies of the present Polish Government.

In the course of 1955 and 1956, political events in Poland vitally affected the regime under which that country was living. It is to the great merit of the Polish legal profession that it rose to the occasion and took the initiative to embody the political transformations in the Polish legal system.

Administration of justice in Poland during the past year has resulted in an increase in the protection of the accused in criminal trials.

The Poznan riots in June, 1956, were a culmination of the dissatisfaction with the Communist regime which had been generating for years. A corporal of the security police was among the persons killed; several hundred people were arrested and twenty-two were brought to trial. The Poznan trials following the riots were the first criminal trials in postwar Poland in which the court acted independently; the defendants received fair treatment and were allowed to present their defense as they wished. Thus, the defendants and their counsel described their maltreatment by the police at length, declaring that during investigation the police had beaten and kicked them, dragged them by the hair, struck them in the face with rods and smashed them against walls.

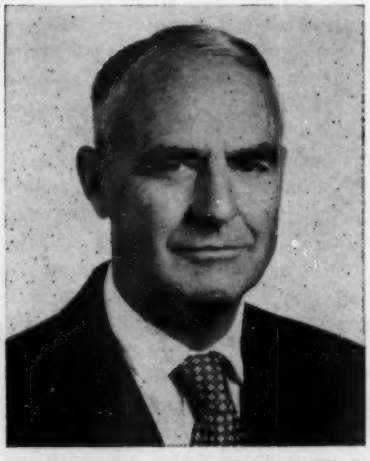
Other information of police abuses comes from the Eighth Plenary Session of the Central Committee of the Polish United Workers' Party (Communist) held during the last ten days of October, 1956. One of the members of the Presidium of the Central Party Control Board states that "innocent people were caught in the streets and after seven days of investigation were sent to a lunatic asylum, unfit to live . . . people were murdered . . . the director of the Investigation Division of the Security Police personally tore off people's nails, poured water over them and ordered them to stand outdoors in the freezing cold".[1]

The Poznan trials were in sharp contrast with the court practice of the immediate past when a judge would be disqualified "for an attempt to discredit the new Security Police and the public administration authorities".[2] The dominant position of the prosecution in the court was changed at Poznan by treating the government prosecutor as a party to the trial. The sentence of the court was impartial and punishment was lenient. The judge barred the application of the Emergency Criminal Code, demanded by the prosecutor, and applied the more lenient provisions of the Criminal Code of 1932. The court held that the prosecution had not proved the defendants responsible for the corporal's death, sentenced two of them to four and a half years, and the third to four years, of imprisonment. Under the Emergency Criminal Code ten-year sentences would have been mandatory. Other defendants were sentenced to from six months to six years imprisonment.

Rehabilitation Proceedings

Releasing innocent people from imprisonment became a matter of national concern; the newly appointed Minister of Justice and the Chairman of the Council of Ministers had raised the question of such release in Parliament in April, 1956. Amnesty was granted and 36,000 people benefited from it; at the same time the so-called rehabilitation proceedings were initiated for the purpose of "correcting mistakes of the past" and "restoring esteem for the

1. *Nowe Drogi*, official periodical of the Polish United Workers' Party, No. 10 (1956), pages 60-61.
2. Statement made by the then Deputy Minister of Justice, L. Chajn, *Demokratyczny Przeglad Prawniczy*, No. 7 (1956), page 6.



Harry H. Semmes was born in Washington, D. C. and received his B.S. from Dartmouth College and his LL.B from George Washington University. He was admitted to the Bar of the District of Columbia in 1916 and has practiced there since that date, with time out for commands in Armor in World Wars I and II.

courts". Rehabilitation proceedings are now being carried on by reopening finally decided criminal cases. The available sources reveal that up to February, 1957, the courts had reviewed cases involving 610 persons. Some of these were acquitted by the Supreme Court and the sentences of others were set aside and new trials ordered. In addition, 10,000 peasants unjustly punished for not having delivered their produce to the government are at present waiting for a review of their cases.[3]

Political Thaw Follows the Legal Thaw

Purges were made within the ranks of the Party and the government. The Ministry of Security was abolished and the Security Police were disbanded. The Chief of the Security Police was released from his post and the members of the Security Police guilty of abuses were put in prison. At the same time all top-ranking officers engaged in the administration of justice were dismissed from their positions. This included the Minister of Justice, who was accused of "making judges second class government employees", and "exposing judges to pressure by non-judicial authorities",[4] the Chief Prosecutor of the Military Tribunal, and the Chief Justice of the Supreme Court. Both the Minister of Justice and the Attorney General were made responsible for the abuses committed by government attorneys in exerting pressure upon the courts. In addition the Party dismissed the Chief of the Politburo Commission for Security Matters who, on behalf of the Party, supervised criminal proceedings and issued instructions in individual cases.

Legal Code Reforms Contemplated

Reform of the laws has been generally demanded for a long time. The Fourth Convention of the Polish Lawyers' Association, held in December, 1955, adopted resolutions on this matter. A codification commission, composed of experts in all branches of law, was established by an order of the Chairman of the Council of Ministers on August 23, 1956; it was directed to prepare, among other things, a draft on the judiciary system and a code of criminal procedure. Since the commission started its work but a short time ago, there is no material available to suggest what direction it will take. The discussions carried on in legal periodicals and the statements of some members of the commission indicate that the reforms will cover three substantial problems in the administration of the machinery of justice.

The independence of the courts is the recognized cornerstone of the personal liberty of citizens. The Judiciary Act of 1950, which amended the prewar Judiciary Act of 1928 and the policy of the Minister of Justice in the execution of this Act, resulted in depriving courts of their independence and the esteem of the people. Restoration of the independence of the courts became a matter of prime importance. Experience with police practice during investigations of criminal matters persuaded lawyers to demand a change in the rules of the Code of Criminal Procedure introduced by the law of April 28, 1949. These rules took away from the courts jurisdiction to conduct investigations and transferred it to the police, permitting the results of police investigations to be used in evidence at trials.

A demand is now being made for a restoration of the judge investigator's office and the subjection of investigations to the supervision of the courts.

On July 20, 1950, the Public Prosecutor's Office had been reorganized by law and endowed with supervisory power over the everyday administration of justice by the courts, with disastrous results. It gave the prosecution a preponderant position in court proceedings and changed the hierarchy system in the administration of justice. Lawyers now demand a reorganization of the prosecutor's office so as to include it in the general framework of the administration of justice machinery.

Those of us in the American Bar Association should look with the highest admiration to the leadership of the lawyers of Poland and their movement toward establishing in that country the "rule of law and not of men".

3. *Prawo i Zycie*, No. 5, 1957.
4. J. Jodowski, President of the Polish Lawyers' Association and a member of Parliament. Excerpt from his speech delivered at the Parliament, published in *Nowe Prawo*, legal periodical issued by the Ministry of Justice, No. 6 (1956), pages 3, 5, 6 and 7.

Eminent Domain Under a Treaty:

A Hypothetical Supreme Court Opinion

by Eberhard P. Deutsch • *of the Louisiana Bar (New Orleans)*

Pending disputes as to the advisability of limiting the internal legislative effect of treaties have recently been stimulated by a pamphlet entitled "Peace Through Disarmament and Charter Revision", published in February of this year by Mr. Grenville Clark, of the New York Bar, and Professor Louis B. Sohn of the Harvard Law School, and widely circulated throughout the world. They suggest wholesale revision of the United Nations Charter to "put teeth" into a detailed plan for enforced disarmament. One of their proposals is for establishment of a United Nations Atomic Energy Authority with power to acquire all nuclear materials in every country throughout the world by condemnation proceedings in the courts of the member nations. In this hypothetical opinion, Mr. Deutsch considers the validity, under our present constitutional system, of such a treaty clause providing for expropriation of land containing fissionable materials through proceedings in the national courts of the locus rei sitae.

This controversy arises from certain provisions of the Atomic Energy Convention, a multi-partite treaty among various member nations of the United Nations. The Convention was signed in behalf of this country on January 12, 1960, was ratified by the Senate on June 18 of the same year, and was proclaimed by the President on June 27, 1960.

This treaty is the outcome of continued efforts, following on the heels of the first atomic explosion in 1945, to obtain some effective supra-national control over the use of atomic energy, particularly for destructive and warlike purposes.[1]

A feature of all of these efforts has been the idea that the supra-national control body must have absolute authority over all sources of uranium and other materials peculiarly used in the production of atomic energy.

The Convention at issue creates a fifteen-member Atomic Energy Authority as an integral body of the United Nations. Details of the organization of the Authority are by and large irrelevant to the questions presented in this case.

It may simply be noted that this country, in common with each other permanent member of the Security Council of the United Nations is permanently represented by one member of the Authority; that no nation may be represented by more than one member; and that the Authority is not responsible to this or any other individual nation, but only to the United Nations itself.

We need not stop to describe the complex of powers and functions inherent in the Authority. The exercise of but one of its functions is here concerned.

Conformably to the concepts of those who have led the movement of which the Convention is the culmination, it is stated as one of the underlying principles of the Convention that the Authority shall ultimately control all sources of uranium and other materials peculiarly adapted for use in the production of atomic energy.

Such control is to be achieved through acquisition, by the Authority in its discretion, of actual ownership of land constituting such sources, as they are defined technically in the Convention. The Convention provides, broadly, that ownership is to be obtained through a process in the nature of condemnation or eminent domain proceed-

1. For partial documentation of these efforts, see *Agreed Declaration of November 15, 1945*, issued by the President of the United States and the Prime Ministers of the United Kingdom and of Canada; joint recommendation of the United States, the United Kingdom and the Soviet Union, at the Moscow Conference, on December 27, 1945; Baruch, *International Control of Atomic Energy; Growth of a Policy*, Department of State Publication 2702, October, 1946, and *Speech by Bernard Baruch*, Department of State Publication 2681, October 8, 1946; Report of the Joint Committee on Atomic Energy, *Hydrogen Bomb and International Controls: Technique and Background Information*, 81st Cong., 2d Sess., July, 1950; Clark and Sohn, PEACE THROUGH DISARMAMENT AND CHARTER REVISION (1956); and address by President Eisenhower before the General Assembly of the United Nations Organization, Department of State Publication 5314, General Foreign Policy Series 85.

ings, denominated in the Convention and hereafter in this opinion as expropriation, instituted and prosecuted in the national courts, and by appropriate procedure established by the laws, of the nation within whose jurisdiction the expropriated source lies.

It is also provided that the Convention shall be binding on all parties who ratify it, without the necessity for implementation by national legislation.

Acting by virtue of these provisions, the Authority, through its legal staff, instituted an expropriation proceeding with reference to the land here involved, in the District Court of the United States for the District of Utah, within which the property is situated. The proceeding was instituted and has been prosecuted under the procedure provided in 40 U.S.C. 257 *et seq.*

The owner of the property, the petitioner in this Court, appeared in and contested the expropriation proceeding. The district court, finding that the expropriated land is of the type comprehended within the technical definition of the Convention—a finding which has not been contested before us—rejected petitioner's objections.

The judgment of the District Court was affirmed by the Court of Appeals. Because of the importance of the issues presented, we granted certiorari. — U. S. —.

At the outset, we take up and dispose of a preliminary contention of respondent. This is that petitioner, having been awarded compensation for his property, and making no objection as to the sufficiency of the compensation, has no interest in respondent's capacity to effect the expropriation of which complaint is made.

But condemnation, in this country at least, has never been considered a matter involving exclusively the value of the property condemned. Mere willingness on a government's part to pay the just value of property does not *ipso facto* foreclose all questions of the right to expropriate.

In a republic such as ours, a landowner's protest against condemnation cannot be silenced by the simple expedient of paying him the fair price of his land. Where government exists and functions by the consent of the governed, the landowner remains entitled to question the authority of government to take his land at all.

A familiar example of such a question habitually raised by landowners and adjudicated by our courts, is whether a condemnation is had for a "public use".[2] Under principles analogous to those which allow that question to be raised, we hold that petitioner is entitled to raise the question of the Authority's power to expropriate his land; and pass to consideration of that issue.

Petitioner raises no question here as to the procedural validity of the proceedings had below, or as to the necessity of vesting actual ownership of uranium properties in the Authority in order to secure to it the control over sources of atomic energy contemplated by the Convention.

In the light of the express affirmative provision of the Convention itself, mentioned above, we are not faced with the often vexatious question whether the instrument is self-executing.[3] Under Article VI of the Constitution, the treaty is the "supreme law of the land" and by its terms immediately operative throughout the United States without any implementing legislation by Congress.

The only issue posed by petitioner is whether the Authority, an international body created by treaty, may, under the Constitution of the United States, validly be granted power under the treaty to expropriate private property lying within the territory of the United States.

An initial serious problem in the discussion of this issue is the extent to which this Court may call in question the validity of the provisions of a treaty which has duly been executed and ratified by the United States.

It is precisely because of the extreme delicacy of the questions usually regulated in that manner, often incipient questions of war or peace, that the treaty-making function was delegated under the Constitution to what may be described as a special committee consisting of the Chief Executive assisted by one house of the legislative branch,[4] perhaps to the complete exclusion of interference by the judiciary.

In sum, once the agencies charged by the Constitution with making treaties have, through a treaty, pledged the faith of this country to a given course of action, would it be consistent with the Constitution for the judiciary to break that faith and perhaps gravely to imperil the external relations of this country, by effectively precluding compliance with treaty commitments?

Certainly, national courts have never taken it upon themselves to decide questions arising among parties to an international agreement, from failure of one or more of them to discharge their undertakings thereunder.[5]

It is urged that very different considerations come into play when the issue presented is as to the impact of a treaty to which this country is a party, on the rights of its own cit-

2. See 2 NICHOLS ON EMINENT DOMAIN (New York, 1950) 419 *et seq.*, sections 7.1 *ff.*, and cases collected therein.

3. See Chief Justice Marshall's opinions in *Foster* v. *Neilson*, 2 Pet. 253 (1829), and *United States* v. *Percheman*, 7 Pet. 51 (1833), arriving at contrary answers to this question with respect to the same treaty.

4. "The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members." Message of President Washington, 1 MESSAGES AND PAPERS OF THE PRESIDENTS 194. See also the discussions reported at, e.g., 2 Farrand, RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787 (1911) 392-94 and 3 Farrand, op. cit., 250-51, 348. While much of the philosophy behind this reasoning has, in modern times, been rejected in favor of open negotiation of international agreements, the historical background of a constitutional provision cannot be ignored in its interpretation, at whatever epoch that interpretation takes place.

5. "The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts." *The Chinese Exclu-*

izens within its own territory.

Much emphasis is laid on Mr. Justice Curtis' *dictum* that "if the people of the United States were to repeal so much of their Constitution as makes treaties their municipal law, no foreign sovereign with whom a treaty exists could justly complain, for that is not a matter with which he has any concern".[6]

Reference is also made to the British practice, under which no treaty to which that power is a party, is given effect by its courts as municipal law until Parliament has by statute acceded to the treaty.[7]

Britain, unlike the United States, does not have a constitution with a "supreme law" clause respecting treaties. Parliamentary approval is still required in Britain to make this Convention effective as domestic law, notwithstanding its self-executing terms,[8] whereas in the United States this treaty is immediately effective as domestic or internal law throughout the land.

Even if it is true, as contended by petitioner, that this treaty will not be effective to authorize expropriation in Britain and most other countries of the world in the absence of implementing domestic legislation, that argument fails here. It is no concern of this court whether other countries carry out the provisions of this treaty.

It is of some significance that no provision of a treaty, at least insofar as affecting its operation as an international agreement, has heretofore been refused judicial enforcement by the courts of this country on grounds of constitutional invalidity.[9]

From earliest times, judicial disinclination to strike down treaties has been in evidence.

In 1796, in the leading early case involving a treaty, Mr. Justice Chase doubted that "this court possess (es) a power to decide, whether this article of the treaty is within the authority delegated to that body (Congress), by the articles of confederation"; and added that "if the court possess a power to declare treaties *void*, I shall never exercise it, but in a very clear case indeed".[10]

In 1829, in *Foster* v. *Neilson*, Mr. Chief Justice Marshall pointed out that "the judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous".[11]

In 1915, in *MacKenzie* v. *Hare*, this Court ruled similarly.[12]

In 1920, in *Missouri* v. *Holland*, Mr. Justice Holmes stated, for this court, that "it is open to question whether the authority of the United States (as the phrase is used with reference to treaties in the Supremacy Clause) means more than the formal acts prescribed to make the convention".[13]

This discussion merges by almost insensible degrees into that of petitioner's contention.

If this Court has power to refuse enforcement of provisions of a treaty, certainly that power must be exercised with the most scrupulous caution, and only in cases of absolute irreconcilability of the treaty with some express provision of the Constitution.

Broad dicta in older opinions of this Court to the effect that "the treaty power, as expressed in the Constitution", is limited "by those restraints which are found in that instrument",[14] and that the federal jurisdiction, as confined to the powers delegated to the federal government by the Constitution, cannot "be enlarged under the treaty-making power",[15] have been restricted by the decision in *Missouri* v. *Holland*, in which a treaty was enforced on the narrow ground that it did "not contravene any prohibitory words to be found in the Constitution".[16]

This is the complete answer to petitioner's argument based on the thesis that the Constitution delegates no power to the Federal Government to authorize a supra-national authority to expropriate land within a state.

We held directly, in *Missouri* v. *Holland*, and this holding is bulwarked by the words of Mr. Justice Sutherland in *United States* v. *Curtiss Wright Export Corporation*,[17]

Eberhard P. Deutsch has been practicing in New Orleans since 1925. He is a member of the Association's Committee on Peace and Law Through United Nations.

sion Case, 130 U.S. 581, 602 (1889).

6. *Taylor* v. *Morton*, 2 Curtis 454 (CC Mass.-1855), affd. 2 Black 481.

7. See *Attorney-General for Canada* v. *Attorney-General for Ontario* (1937) AC 326, 347-48 (PC).

8. *Canada* v. *Ontario*, cited in footnote 7; CANADIAN BAR REVIEW, November, 1951, page 969; McNair, Treaties, Oxford 1938, pages 7-8.

9. *New Orleans* v. *United States*, 10 Pet. 662 (1836), may be exemplary of an "internal" facet of a treaty having no relation to its "external" effectiveness. The question presented in that case was whether any interest in certain lands vested in the United States by virtue of the treaty of cession of the Louisiana Territory by France; or whether such vesting was precluded by constitutional provisions limiting federal powers, leaving title in the City of New Orleans. Other examples of "internal" facets of treaties would seem to be embodied in such provisions of the Covenant of Human Rights as the guaranty of paid vacations for workers. Justice Curtis may have had such situations in mind when he uttered the statement quoted in the text, *supra*.

10. *Ware* v. *Hylton*, 3 Dall. 199, 237 (1796). See also *United States* v. *Reid*, 73 F. 2d 153, 155 (9th Cir. 1934): "It is doubtful if courts have power to declare the plain terms of a treaty void and unenforceable, thus compelling the nation to violate its pledged word, and thus furnishing a *casus belli* to the other contracting power."

11. 2 Pet. 253, 307 (1829).

12. 239 U.S. 299, 311 (1915).

13. 252 U.S. 416, 433 (1920).

14. *Geofroy* v. *Riggs*, 133 U.S. 258, 267 (1890).

15. *United States* v. *New Orleans*, 10 Pet. 662, 763 (1836).

16. 252 U.S. at 433.

17. 209 U.S. 304, 315-16, 31 (1936).

that the Federal Government, in its conduct of the nation's foreign relations through the treaty-making power or otherwise, is not confined to exercise of the powers expressly delegated to it by the Constitution.

The decisive effect of our opinion in *Missouri* v. *Holland* is not lessened because the immediate enactment questioned in that case was a statute adopted in implementation of a treaty.[18] The statute was upheld by reason of vigor drawn by it from the treaty. We could not have sustained the statute without effectively holding valid the treaty which alone gave it constitutional life.

It must be noted that our discussion of *Missouri* v. *Holland,* in *Reid* v. *Covert,*[19] disregarded the conclusion of Mr. Justice Holmes that "it is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention"—a conclusion drawn by the learned justice from the distinction between the constitutional provisions requiring statutes to be enacted "in pursuance of" the constitution, while treaties are declared to be valid if made "under the authority of the United States".

Nor did we consider, in *Reid* v. *Covert,* our earlier holding, in *Pink* v. *Fleming,* to the effect that the Fifth Amendment was impotent as to an executive agreement dealing with matters of international concern.[20]

It must further be confessed that we also failed to consider and distinguish, in *Reid* v. *Covert,* the holding of this Court, in *United States* v. *Curtis Wright Export Corporation, supra,* that the powers of the Federal Government are not limited, in the conduct of its foreign affairs, by the powers expressly delegated to it in the Constitution.

It should likewise be noted that the opinions of the Court in *Reid* v. *Covert* were sharply divided, in reversal, on rehearing, of prior contrary opinions rendered by the court itself in the same cases during the immediately preceding term.

In any event, suffice it to say that the opinions of this court in *Reid* v. *Covert* dealt with a narrow state of facts in criminal prosecutions of peculiarly domestic concern, whereas we are here dealing with a subject of wide international import; and that in our discussion of *Missouri* v. *Holland,* in the cited case, we stated expressly that "there the Court carefully noted that the treaty involved was not inconsistent with any specific provision of the Constitution"[21]—a factor of particular significance in the case at bar.

Nor are we disposed now to change the views crystallized in *Missouri* v. *Holland.* We cannot overlook the recent repeated refusals of the agencies of constitutional amendment, to give favor to proposals which would have overruled the doctrine of that case by limiting the Federal Government, in the exercise of all of its treaty-making powers, to the powers delegated to it by the Constitution.[22]

By repudiating those attempts, the American people have unmistakably stamped with their approval the principle of plenary federal power in the field of international relations, restricted, if at all, only by express words of constitutional prohibition.

No provision of the Constitution expressly prohibits the expropriation at issue. The statement by Mr. Justice Field, that the treaty-making power cannot "authorize . . . a cession of any portion of the territory of" a state without its consent,[23] is *obiter dictum,* perhaps not fully considered in all of its implications, and, applied literally, would lead to untold complications in the field of treaties of peace.

The dictum that one sovereignty cannot condemn for the public use or benefit of another[24] is equally inapropos the question here to be resolved. There can be no doubt that a sovereign can authorize condemnation for its benefit by another.[25] We decline to question the evident conclusion of the President and the Senate that public purposes of the United States will be served by such expropriations as that at issue.

Finally, petitioner contends vigorously that, in the light of this country's pre-eminence in the field, control of atomic energy is not a proper subject for bargaining with other nations. Any doubt on this score[26] must similarly be deemed settled by the decision of our treaty-making authority to deal with the subject in an international agreement.[27]

From what we have said, it follows that the Convention is not invalid in its present application, and that the decision appealed from must be, and is accordingly, affirmed.

---

17. 299 U.S. 304, 315-16, 318 (1936).

18. *Cf.* Chafee, *Stop Being Terrified of Treaties,* 38 A.B.A.J. 731, 732, footnote 5 (1952).

19. 353 U.S. (June 10, 1957).

20. 315 U.S. 203, 226 *et seq.*

21. 353 U.S. at page .

22. See debates in, and action by, the Senate, on consideration of S.J. Res. 1, on report by Senate Judiciary Committee, 83d Congress, 1st Session, 100 Cong. Rec. *passim,* 2251.

23. *Geofroy* v. *Riggs,* 133 U.S. 258, 267 (1890).

24. *Kohl* v. *United States,* 91 U.S. 367, 373-74 (1875).

25. See *Olson* v. *United States,* 292 U.S. 246 (1934); *Latinette* v. *St. Louis,* 201 Fed. 676 (CA 7-1912); *Hagerla* v. *Mississippi Power Co.,* 202 Fed. 776 (SD Iowa-1913). By the treaty of 1905 between the United States and Panama, this country was empowered to condemn land in Panama to form the Canal Zone. 33 Stat. 2234. In 1947, Congress approved an agreement between the United States and the United Nations Organization, which contemplated condemnation by this country of land for use by the Organization. Public Law 357, 80th Cong., 1st Sess.

26. *Cf.* "Mr. SMITHEY. Mr. Backus, . . . is it your contention that the control of atomic energy is a matter essentially within the domestic jurisdiction of the United States?" "Mr. BACKUS. I would say it could well be so; yes." Hearings before a Subcommittee of the Senate Judiciary Committee on February 19, 1953, 83d Cong., 1st Sess., pages 210-11.

27. *Cf. Oetjen* v. *Central Leather Co.,* 246 U.S. 297, 302 (1918): "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." And see *Girard* v. *U.S.,* July 8, 1957. See also Moskowitz, *Is the U. N.'s Bill of Human Rights Dangerous?* 35 A.B.A.J. 283, 285 (1949): "Once a matter has become, in one way or another, the subject of regulation by the United Nations . . . that subject ceases to be a matter being 'essentially within the domestic jurisdiction of the member states' "; and State Department Publication 3972, Foreign Policy Series 26: "There is no longer any real distinction between 'domestic' and 'foreign' affairs". Even while the Constitution was being formulated, Madison did "not think it possible to enumerate all the cases in which such external regulations would be necessary". 3 Elliott's *Debates* (2d ed. 1836) 470.

Do You Understand Juvenile Courts?

Lawyers Need More Information About Them

by **Walter H. Beckham** • *Judge of the Juvenile and Domestic Relations Court of Dade County, Florida (Miami)*

The development of the juvenile court is recent, and many lawyers have only a cursory knowledge of this important instrument for curbing delinquency. Judge Beckham writes of the philosophy and the procedures that distinguish juvenile courts from criminal courts.

As one who at one time was a very active practitioner appearing in many courts in various types of litigation and who has been a Judge in the Juvenile and Domestic Relations Court for over twenty years, I am quite impressed with the fact that a great majority of our American lawyers know very little about the philosophy, procedure and operation of juvenile courts. Since the organized Bar may claim credit for conceiving the idea and philosophy of these courts, the first having been established through the co-operation of the Chicago Bar in 1899, I feel that American lawyers should be better informed about juvenile courts and how they may often make use of them in their practice.

I realize that due to the type of cases involved, there are usually no large fees to be earned by appearing in these courts. I further understand and regret that a great majority of the law schools of this nation give little or no instruction to new lawyers about the practices and philosophies of juvenile courts. A most common misconception is that such a court is merely a modified criminal court which deals with those brought before it more indulgently than if the defendant were an adult. This idea, of course, is entirely erroneous, since the philosophy of juvenile courts, and their purpose and objects, are entirely different and distinct from those of criminal courts, and represent an entirely new legal concept and procedure, which places the welfare of the child first and foremost and the technical rights of parents and others in a secondary place. It should be understood that the definite purpose of such courts is not to punish, but to rehabilitate and prevent erring young citizens from becoming criminals. Therefore, judicial functions and procedures of juvenile courts are all established to accomplish this purpose, and they have a wide discretion to do what is best for the child, including detention and other disciplinary treatment, as well as probation. In the beginning, the principles behind juvenile courts were attacked as a flagrant disregard of the constitutional rights of parents and of children. A juvenile court may hold private hearings with the public excluded, protect the privacy of court records and hearings, order a child taken into custody without a warrant by a probation officer when necessary for its own protection or for the protection of the community, act on unsworn testimony, have children testify against themselves and commit children to a welfare home for indefinite periods. Such things are now freely accepted as orthodox juvenile court procedure, but they were once bitterly attacked as unconstitutional. For some fifty years now, such courts have existed with constantly broadening functions and increased appreciation, and these objections have practically all been put to rest. The procedure now used by the better type of juvenile courts has been repeatedly upheld by our highest courts as constitutional. It is usually provided either by statute or by judicial decision that juvenile court practices are based on the principles of equity, thus eliminating contentions that constitutional provisions designed to protect persons charged with crime should be applied to cases of children in juvenile courts as delinquents, but not as criminals.

During the past fifty years American juvenile courts have become firmly established in every one of our states. Experience shows that

Park Madison Studio

Walter H. Beckham has been on the Bench of the Juvenile and Domestic Relations Court in Miami since 1933. He has heard cases involving more than 30,000 children without having had a single appeal taken from any of his rulings. He is a former President of the National Council of Juvenile Court Judges and is at present the Senior First Vice President of the International Congress of Juvenile Court Judges.

---

they function best when set up as separate courts not merely made divisions of another court, with a full time judge who is an attorney. Women's clubs, civic clubs and school organizations have consistently encouraged and aided in the expansion of the work of juvenile courts and in the raising of their standards. For a long time the existence of such courts was not noticed by bar associations and other groups of lawyers, but in recent years committees have been set up at the national, state and even the local level to throw the influence of the Bar back of juvenile court development and protection. This is a most helpful sign and augurs well.

One of the things the juvenile court judges of the nation have expressed is the need for spreading more general knowledge about juvenile courts among the Bar, getting more law school instruction about juvenile courts, and encouraging new lawyers to make a career in this field. Too often lawyers are elected, appointed or assigned, as a judge of one of these courts without any prior experience or understanding as to their philosophy or procedure. Early laws did not even provide that the judges of juvenile courts had to be attorneys, but as the courts have grown and developed such a requirement has now been adopted in practically all of the states.

There now exists in our nation a National Council of Juvenile Court Judges, which holds an annual convention, bringing together judges of juvenile courts from all over the nation, as well as representatives of foreign countries. In addition there is an International Congress of Juvenile Court Judges which meets every three years in Belgium, with the encouragement and financial support of the Belgian Government. Some years back Count De Wiart, and his lovely wife, Countess De Wiart, of Belgium, visited this country and were so impressed with the operation of American juvenile courts, particularly that of Judge Ben Lindsey in Denver, that they returned to their native country and became "missionaries" for the establishment of similar courts all over Europe. Count De Wiart was later Minister of Justice of Belgium, and I had the high privilege of being a guest in his home while attending a session of the International Congress of Juvenile Court Judges.

If lawyers would inform themselves fully as to the operation and facilities of juvenile courts, they would find many opportunities for using the services of these courts in many difficult domestic relations cases involving children. These courts can be of great assistance in the determination of child custody based on the welfare of the children rather than on mere technical legal rights and conditions. Such courts have facilities for "behind the scenes", neutral investigations of cases.

The American Bar should be proud of the American system of juvenile courts. No lawyer's legal education is entirely complete until he has familiarized himself fully with the operation and philosophy of juvenile courts, particularly in his own state and his own neighborhood. His unofficial visit in a juvenile court will always be welcome, and he will find it most satisfying and heartening if he sometimes appears there in his professional capacity. Our American courts have learned much from the philosophy and experience of juvenile courts; for example, probation and parole and pre-sentence investigations all originally were developed as procedures of juvenile courts. Some of our leading jurists today have even recommended that divorce cases should be handled like hearings in Juvenile Court, such hearings being entitled not "John Smith versus Mary Smith" but "The State, in re John and Mary Smith, and their children, Mary and John", which is the standard juvenile court practice.

It is very refreshing to note that in recent years some of our leading jurists and teachers, such as Roscoe Pound, of Harvard University, have interested themselves in the work of juvenile courts and in their continual improvement, thus further fostering the appreciation of such courts among lawyers here and abroad. Our State Department at this time is receiving requests for information about the American juvenile court system from foreign countries, and from time to time foreign visitors come to this country to study our juvenile courts with a view toward establishing a similar system in their own country.

Perhaps no organization in the nation has done more to foster and develop juvenile courts in this nation than the National Probation and Parole Association of New York, an organization that has likewise continually sought to develop and extend probation and parole services in our criminal courts. Recently one of our charitable foundations has fully implemented this fine organization for doing more work in our field. Under its sponsorship an Advisory Council of Judges of the United States has been created, bringing

together key judges, both of juvenile courts and criminal courts, to develop uniform standards for practice and procedure throughout the nation. In this group, now under the Chairmanship of Chief Judge Bolitha J. Laws of the United States District Court for the District of Columbia, are many of the nation's most distinguished jurists, who are gladly giving of their time and knowledge to develop uniform principles and recommend statements of procedure and practice for the use of all such courts in the United States.

When people of such prominence and standing in the professional field are interested and are giving their time and knowledge in the development and improvement of such courts, each member of the American Bar should take renewed interest and see that he is fully informed as to the character, practice, procedure and operation of juvenile courts.

Do *you* understand juvenile courts?

Views of Our Readers

(Continued from page 683)

bound by its own forms and constrained to desist from occasional idiosyncrasies.

Now is posed the conundrum. What happens when there is no form among all of this decimalized treasury? Wouldn't we be back where we started? We would be subject to the unnerving prospect of cutting a swath through the formalistic jungle. But we could have our "Committee on Forms" roll up its formal sleeves, interpolate a sufficient number of decimal points and give cognizance to the ostensible novelty, admitting it to a place in the pages of form.

Our very lives take on a form. The law is the quintessent formality of living. A tantalyzing adjuration tells us to go out and live—but behave! The living is defined, not the behavior. Does anyone here have a form?

JULIUS CHAIET
New York, New York

A Different Size for the Journal?

■ As a member of the American Bar Association I would like to say I enjoy reading the articles in the JOURNAL very much.

May I suggest that the size of the JOURNAL be changed into the size of a book. The tendency seems to be in all publications to reduce their size as a matter of convenience.

DAVID B. PERLEY
Chicago, Illinois

She Liked the Article by Mr. Luce

"Our Great Hope: Peace Is The Work of Justice," by Henry R. Luce, which appeared in the May issue of the AMERICAN BAR ASSOCIATION JOURNAL rings out a well-known truth long-sought by peace-loving citizens. It also reiterates, the theory promulgated by the great Edmund Burke in his celebrated "Speech on Conciliation With America", especially in the following paragraph: "The proposition is Peace. Not peace through the medium of war; not peace to be hunted through the labyrinth of intricate and endless negotiations; not peace to arise out of universal discord fomented in principle from all parts of the empire; not peace to depend upon the juridical determination of perplexing questions or the precise markings of the shadowy boundaries of a complex government. It is simple peace, sought in its natural course and in its ordinary haunts. It is peace, sought in the spirit of peace and laid in principles purely pacific. . . ."

What Edmund Burke had to say in 1775 was well-worth knowing at the time of our founding fathers, and what the author of the fascinating article has to say is certainly well-worth knowing during our times.

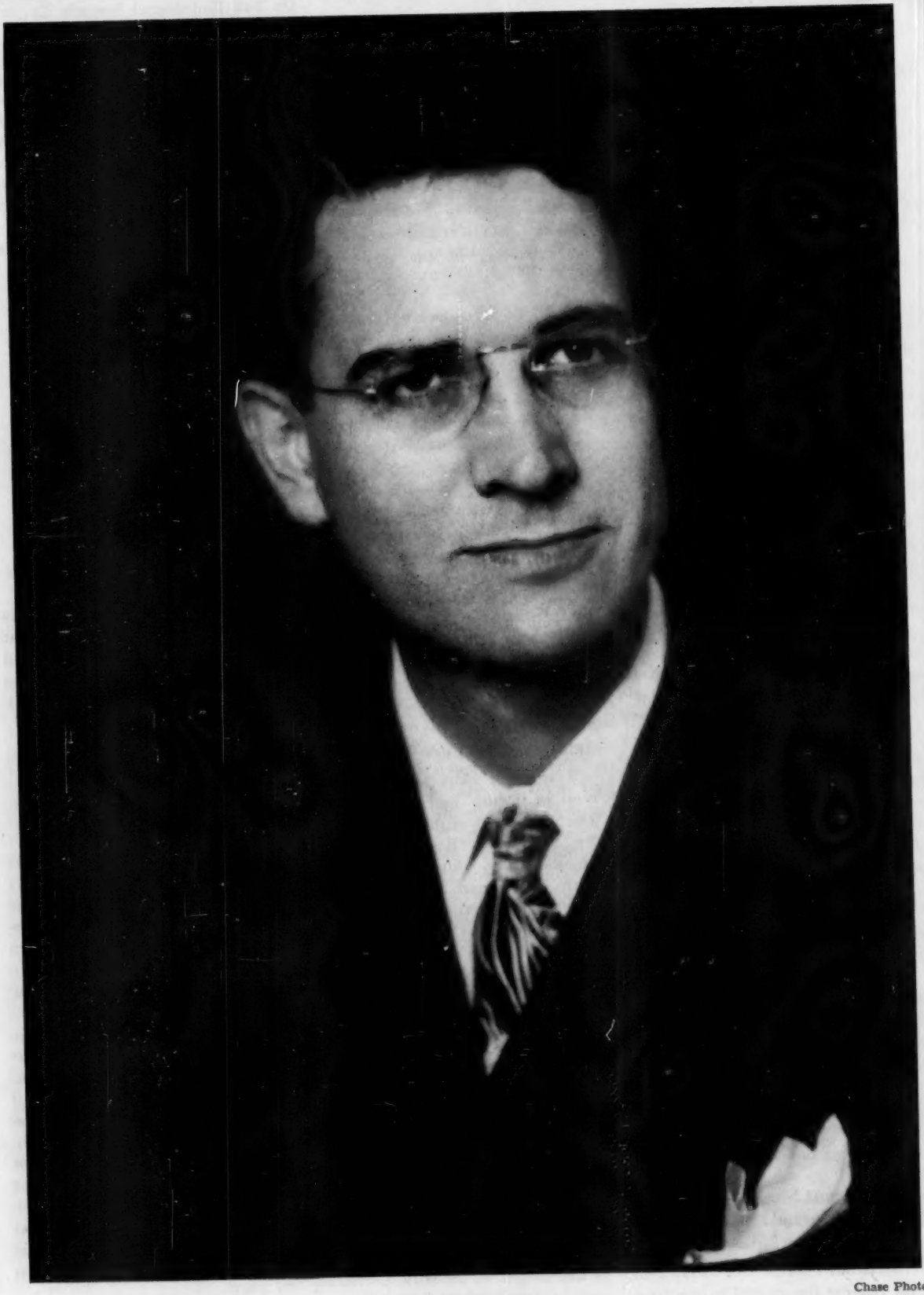
MARIE F. PETROCELLI
Brooklyn, New York

The Luce Article Receives Wide Circulation

I am pleased to see that the May issue carried the article by Henry Luce. The small circulation of the *Connecticut Bar Journal* is not adequate for Mr. Luce's message. I am gratified that it was published in your pages and was pleased to authorize you to publish it.

I was, however, a little disappointed that the *Connecticut Bar Journal* was not mentioned as a footnote and hope that its omission will not serve to embarrass your publication, particularly since the last edition of the *Journal of the American Judicature Society* cited the Luce article as published in the *Connecticut Bar Journal* and the fact that Mr. Luce obtained some 10,000 reprints of his article as it appeared in our pages. . . .

BENEDICT M. HOLDEN, JR.
Hartford, Connecticut



Chase Photo

Charles S. Rhyne

The President's Page

Charles S. Rhyne

My first President's Page is being written in June, in the midst of final preparations for the New York and London meetings, and in the knowledge that it will appear in the JOURNAL after those meetings have passed into American Bar Association history. Full reports will be forthcoming on all aspects of those great meetings, including the Association's pilgrimage to Runnymede to commemorate one of legal history's most momentous events—the birth of freedom under law. The dedication of the monument to Magna Charta, whether viewed in prospect, as I must do at this writing, or in retrospect, as it will be by those who read these words, is an occasion for renewing our dedication to the "rule of law" and to the high purposes which the American Bar Association was founded to serve.

The Association's Constitution lists six objectives, the most all-encompassing of which, it seems to me, are these two: To promote the administration of justice and to uphold the honor of the profession. With the thought that this will be a most active year due to our tremendous growth in membership and our ever-growing service to the public and our profession, I recently asked members of the House of Delegates for comments on whether our Association is meeting its objectives and their suggestions as to future plans, programs and policies. Because of its representative character the House is so organized that it is truly the authentic voice of the organized Bar. Collectively, the members of the House of Delegates now represent approximately 200,000 lawyers. These men and women represent all branches of our profession in every section of the nation and in all fields of endeavor. Their views on how the Association can do better those things which it is already attempting to do and what new projects it should undertake are, therefore, most significant as a basis for planning the present and the future.

The comments received reveal a commendable nationwide interest in the Association and its work. Many of the letters went into considerable detail. All of them evidenced much careful thought and deliberation. The responses make it clear that these leaders of our profession are concerned with such needs as: (1) Adequate legal machinery to establish and maintain peace under law; (2) Improved standards of justice before administrative agencies; (3) Elimination of court calendar congestion; (4) Improvements in criminal justice; (5) Better methods of selecting judges and life tenure and drastically increased salaries for nearly all state judges; (6) Improving justice in traffic courts; and (7) Other programs designed to increase public respect for the law and public confidence in the Bench and the Bar. Those referring to this last named need urged vigorous enforcement of our Canons of Ethics to insure higher standards of professional conduct and a more effective attack on unauthorized practice of the law.

There were many specific proposals. They included such stimulating ideas as a year's free membership in the American Bar Association for each law school graduate; a new magazine, or service, to cover "down-to-earth", "bread and butter" aspects of law so as to provide forms, procedures and ideas serving the economic needs of lawyers; preparation of a "federal legislative program" setting forth everything our Association is for or against; creation of a new committee on federal legislation to provide a much-needed "follow-through" on our federal legislative program; a system of awards or certificates of merit to lawyers who serve outstandingly as court-appointed counsel (or legal aid counsel) in the defense of indigent clients; an award to the "lawyer of the year"; more vigorous urging of legislation to end the salary and rank discriminations which now exist against lawyers in the Armed Forces; a more adequate re-inspection program for law schools to raise the standards of legal education; and a more positive reassumption of the lawyer's traditional role of leadership in public affairs.

Three thoughts were expressed with greatest frequency. The Association should: (1) Do a better job of co-ordinating its activities and programs with those of the 1500 state and local bar associations, (2) Provide its members with more information of direct economic assistance in the practice of law, and (3) Expand its public relations program with the aim of increasing the prestige of the lawyer in the estimation of the public at large. These themes loomed so large in the comments of the Delegates that I anticipate that the House of Delegates, as the policy-making body of the Association, will have these objects firmly in mind as it goes about formulating policies, plans and programs for our Association's 81st year.

The response to this inquiry was so gratifying, so revealing and so challenging that I believe that much good can come from a similar inquiry addressed to the membership at large. I take this opportunity, therefore, to ask each member of the Association to let me have the benefit of his personal evaluation of our Association's present performance and his suggestions for future activities and projects whereby it can be more useful to its members. Your officers cannot try to carry out your wishes or meet your needs unless we know them. In the last analy-

sis the success of our Association in meeting its duties and obligations rests largely upon the help your officers receive from our whole membership.

It is interesting to compare these current comments with the six long-range objectives of our Association: (1) Preservation of representative government in the United States, (2) Legal services for all at a cost within their means, with adequate aid to the indigent, (3) Improvement of the administration of justice in the courts and administrative agencies, (4) Maintenance of high standards of legal education and professional conduct, (5) Promotion of peace under law, and (6) Co-ordination of the activities of the organized Bar.

Since 1951, when the House of Delegates adopted these long-range objectives, our Association has taken giant strides toward perfecting our organization to carry them out. Our Association has completed a Survey of the Legal Profession so our future can be soundly based upon past experience, erected a great American Bar Center where our rapidly growing staff can be centrally housed, created the American Bar Foundation to do essential legal research, created the American Law Student Association which now has 35,000 student members, and most important of all has more than doubled its membership. Ours is the largest association of lawyers in the world.

These achievements give us the requisite manpower and finances (this year's budget is the first to exceed $1,000,000) to assume our rightful place in the affairs of our nation. Our profession on the national level now has a new solidarity, expanded scope and purpose and a new vigor and leadership. We are faced with our greatest opportunity —an unsurpassed challenge to great achievement through our new organized strength. This is a challenge and an opportunity for more effective service not only for the American Bar Association but for the entire organized Bar, national, state, and local. We are in a new era of responsibility and service for the organized Bar.

My distinguished predecessor, David F. Maxwell, who achieved so much for us during the past year, and the group of great leaders of the Bar who preceded him in the office of President have done a tremendous job in bringing our Association to its present high standing. But they would be among the first to say that they have only made a beginning in what the Association should accomplish. I believe that if we so organize our Association's activities as to take full advantage of the wealth of knowledge, ability and experience of our 88,000 members, we can perform the services which the public and profession expect us to provide.

We of the Bar have a duty to be true to the heritage which we acknowledged at Runnymede. Public service, which for us means the defense and maintenance of the "rule of law", is perhaps our most important means of discharging that duty. Public service comprehends not just service to the cause of justice and to judges and the courts, but service to ourselves and to the welfare and prestige of our profession. The American Bar Association is the legal profession's most important organization for public service—that is, for service to the law, the Bench and the Bar. The Association merits and needs every lawyer's active help and participation.

We have an obligation to our country, our profession and ourselves to step out on the path of progress and accept the challenge presented by the ever-changing and expanding duties and responsibilities of our profession in the world of today. I sincerely believe that in a strong legal profession lies the liberty of the people of the United States and that in the liberty of our people lies the hope of the world.

This is my first opportunity since my election as President of the American Bar Association to express my humble and deep gratitude for the honor conferred upon me. I am most conscious of the important duties and responsibilities of the office and the opportunities it provides for service. I am grateful for the privilege of working with all of you to further the purposes of our Association. You have elected an extremely able group of officers and members of the Board of Governors to serve with me. We will work as a team to carry out the work of the Association during the coming year.

To have been inaugurated into office among the great historical shrines at the sources of the common law is a rare privilege and a great inspiration. Thus inspired, and with the help of each of you, your new administration pledges that we will work most earnestly in the service of the public and our profession throughout the year in forwarding the programs and policies of our great Association.

Public Apathy:

The Enemy of Security

by Benedict M. Holden • *of the Connecticut Bar (Hartford)*

Mr. Holden writes that the increasing rise in crime and juvenile delinquency is playing directly into the hands of the Communists—and he places much of the blame for the public's indifference to law and authority upon the shoulders of the Bench and Bar, which, he says, in their zeal to achieve needed reform, often give the public the impression that our system of justice is inadequate and unworthy of public trust.

As long as our people maintain the belief that justice is an essential element of democracy and that that element exists in our land, we have nothing to fear from our enemies. That belief, exemplified by respect for the courts and respect for authority, law and order, indicates public knowledge and acceptance of the theory that justice in America extends to rich and poor equally and without fear or favor, regardless of race or creed. There are deviations from time to time, but these are the exception rather than the rule, and for centuries the average citizen has regarded injustice in other lands and said, "Thank God, such is not the case here." Once the average man waivers in this belief and begins to wonder whether justice actually exists, he is not far from doubting democracy. This leaves the door open for the tender ministrations of the professional Communist propagandist, who sits back and permits loyal, sincere and patriotic Americans to sow the seeds of doubt.

Congressional investigations have long sought to maintain internal security through the public exposure of professional propagandists. Although many such investigators are members of the Bar, none have taken the time to inquire as to the extent to which security has been weakened through the unwitting efforts of sincere individuals and organizations who have gradually, but with certainty, undermined respect for the courts, the law, judges, juries and lawyers, authority and, finally, belief in the existence of justice itself.

The ever-increasing rise in crime and juvenile deliquency is well known. The increase in motor vehicle violations has been noted in several states and attempts at strict enforcement are being made to save lives and property from the dreadful toll caused by irresponsible drivers. The reaction to decisions of the Supreme Court of the United States, attitudes of official defiance, indicate a further tendency to respect the "popular rules" and to disregard the others. Mention by the press of the deficiencies of certain lawyers and judges in generalizations which freely criticize the profession and the judicial system add fuel to the fire. Those who seek to modernize the existing judicial system by way of legislative reorganization speak glibly of "reform" and compare the present with the proposed with terms like "incompetent", "political" and "corrupt". Entertainment media portraying hackneyed characterization of villainous lawyers and idiot judges, presiding over impossible courts, have filled the theaters and the air waves with false impressions. Had these various forces, acting by preconceived plan and in concert, been set in motion by Communist propagandists, the effect upon the average American could not have been more devastating.

None of the various forces can be singled out as the chief factor, but each has made its contribution to the whole. The tragic part of it is that most of the men responsible are motivated by the most patriotic ideals. Others follow a long-standing tradition. Still others are more than slightly overcome by apathy, lulled, perhaps, by the feeling that to do anything about the situation might infringe upon the rights of someone. These various factors, if they appeared separately and seldom, in isolated areas, would not necessarily influence the American mind. It is not until their combined presence

is an all-day, everyday occurrence that the average man wonders whether justice is truly non-existent. Let us examine the innocent parties and the part played by each in molding the present trend toward disregard for authority.

The majesty of the law is exemplified in the Supreme Court of the United States. When it speaks, it speaks with force, and it expects to be obeyed. It goes without saying that since there are two sides to every lawsuit, there is always going to be one side which feels that the Court should have decided another way. Nonetheless, in the past there has been compliance. Today, when those dissatisfied with the rulings of the Supreme Court of the United States evidence their dislike of the orders, they do so by open, defiant and *official* administrative and legislative action. Broadcast through the land, the average man cannot but consider, "If the states themselves defy the Court, there is no reason for me to respect it either." His disobedience of traffic ordinances and his disrespect for authority are the natural and expected results.

Fine legal minds, intent upon securing the best possible judicial system available, speak glibly of "reform", and, in order to emphasize its necessity or desirability, point with some scorn at the existing tribunals. Comparisons are always odious, but, when they take the form of "horrible examples", of "corrupt and political tribunals", and of "incompetent personnel", the odium falls upon the system which may well have existed for centuries. The average man who reasons things out has no alternative but to wonder whether over the years justice has existed at all. Nor would this be wholly damaging if the passage of curative legislation were a certainty, but the unpredictable legislatures may well ignore the pleas for reorganization. If this be the case, the average man will indeed become uneasy, concluding that there is indeed no justice—and, because it follows logically, and the average man is logical, that there is actually little democracy. Some of his less logical fellows may even conclude that if the courts are as bad as the learned critics describe them, they do not merit any respect. Disrespect for a particular court breeds disrespect for all courts, and disregard for all constituted authority follows in due course.

The press is of great assistance in bringing about this alteration of public opinion. Insisting that all news is in the public interest, the press honestly and sincerely strives for law enforcement, for better courts, for ethical lawyers and in articles and editorials attempts to awaken each reader to the local problems with sweeping statements. It is more effective, perhaps, to say "the Bar" than "a few lawyers", or to say "the courts are incompetent", rather than "Judge So and So". Yet each such article or editorial drives home to the public the fact that all lawyers and judges are not to be trusted. The average man cannot respect those whom he cannot trust, and his respect for the things for which the profession stands suffers as a result. Here, too, are the loud and strident claims for "reform", the "horrible examples", the statistics, carefully tailored in favor of the editor. The purpose of it all is to seek enforcement of the law, equally for each citizen, a truly lofty motive. The result is disrespect for the authority of the court, sponsored unwittingly by the biting comments of the editorial. The average man, subject to almost daily news comment as to the unsavory conditions among courts and lawyers, forgets that the exception is the subject of comment and turns his back on them all.

The same average man, distrusting reality, turns his attention to the entertainment media, motion pictures, radio and television. Here, at least, he may seek solace from the increase in crime and the reality of disregard for authority. Here, for a time, he can find adventure and comedy. Here, too, he meets the same old subject: Lawyers are unethical; judges are either villainous or bumbling; the courts make a mockery of justice; and if right prevails, as it must in order to escape the frown of censorship, it is *in spite* of the authority of constituted law —not because of it. Needless to say, the producers of these various forms of entertainment would be expected to declare that they follow the tradition of the theater. They are correct, for since Shakespeare invented Justice Shallow, judges have walked the boards to provide comic relief. W. S. Gilbert in *Trial by Jury* and *Iolanthe* caricatured Bench and Bar. Popular, it continues to draw laughs even to this day. The villainous and unethical lawyer was a fixture of the old melodrama. Defeated in the end, he pointed out that justice triumphed and right prevailed. Following in the well-travelled footsteps of the past, present-day writers and producers continue to present the same old comedy and the same old melodrama, forgetting that in the past the formal entertainment of the theater reached but a few of the public and reached that few but seldom. Today when entertainment is a twenty-four-hour, seven-day-week industry, with programs changing each half hour, those characterizations which for years had been "parts", now become symbols. When eight- and nine-year-old "Western" addicts proudly state, "I can tell the bad guy, Daddy, he is always the lawyer", it is time to regard more closely the entire situation, for eight-year-old distrust may be eighteen-year-old defiance. It would be grossly unfair to lay the disrespect for authority and the resultant rise in crime and delinquency at the door of the entertainment media alone, nor can the disregard of law and order be blamed entirely upon our young.

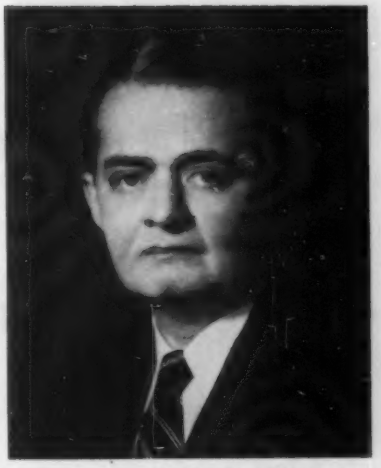
The young are in the habit of copying their elders. If the parents weasel out of traffic tags, villify policemen, voice their distrust for courts and their authority, mock judges and lawyers, we cannot wholly blame the children when they do the same. Nor can we blame the parents, the average man and wom-

an, for their attitude, either, for it developed from the never-ending cry that Bench and Bar are apathetic and inadequate, the courts are corrupt, that laws are not enforced, that justice is not among us.

We may blame the overzealousness of the reformers, the inability of the dissident officials and legislatures to recognize the majesty of the law, some jurists and lawyers for conduct which places Bench and Bar in the spotlight of scorn, the entertainment media for failure to realize that repetition often molds public opinion. We may well blame the members of the Bar, who have marshalled all the facts individually, but who have failed to regard one fact as related to another.

Bar associations meet solemnly in various localities. Their traffic sections amass quantities of statistics relating to accidents and arrests in an effort to bolster enforcement, thereby saving lives and property. The statistics point to the inevitable conclusion that more and more people flout the little laws. As this becomes habitual, the more important laws will be flouted too. This, the criminal law sections study with intensity, and more revealing statistics are compiled. Across the hall, the constitutional law sections debate the effect of the opinions in the Segregation Cases and the constitutionality of defiant counter-legislation. In the meantime, the Resolutions Committee is wrestling with the recurrent problem of the "dignity" of the Bar. In the annual resolutions, decrying the manner in which Bench and Bar are portrayed on stage and screen, the derogatory newspaper articles, each offense is catalogued in carefully chosen phrases, solemnly noted, and duly mailed to the offenders. The offenders, of course, care little about the "dignity" of the offended, and nothing is done about it. The court reorganization people, at the same meeting, decry the existing systems and by added odious comparison insure that everyone understands that as long as the present courts are maintained, there can be little expectation that justice will continue. None of these various and well-meaning groups stops to consider the effect of its little statistic, or its conclusion, or its contribution to the whole. Had they done so, the attitude of the average man might have been determined and corrected long ago.

It cannot be argued that democracy wavers on the brink for the sole reason that various groups and individuals misrepresent judges, lawyers and courts, or for the reason that newspapers and critics are unkind to Bench and Bar, nor can these be the sole causes of crime and delinquency. There are other and, mayhap, more serious problems which create the disregard for authority so evident today. If the dislike and distrust for courts breeds disregard for authority, then whether the reason be sole or contributing makes little difference, for it is a reason which can be controlled—and its control is as much a duty of the Bar as is traffic control, court reorganization or the study of constitutional law. If public opinion has been molded toward antipathy to authority by neglect, inadvertence and misunderstood tradition, it can be re-educated to respect for law and order by awareness and concerted action. It is no longer a question of soothing ruffled dignity by resolution, but one of calling attention to the causes for distrust and the results which recurrent portrayals and derogatory statements have achieved. It calls for no sweeping senatorial investigation, for *public* apathy—not the apathy of any profession—is to blame. We all deal in extremes, and intensity of expression and singleness of purpose can oftentimes be misleading. Too seldom do we of the Bar, the press, the entertainment field stop to consider that the average man is not always as intense as we are. He forms his opinions from what he sees and hears—and he sees and hears from public officials, from learned sources, from his headlines and editorials, in his movies and television shows that courts are "one-sided", lawyers are "corrupt", and judges are comic characters. Respecting these as sources of knowledge and integrity, he believes—and, believing, loses his respect for the law, order and authority which Bench and Bar represent. While all this takes place the Communist propagandist sits by his silent typewriter, content. The forces which he should fear the most are doing his work for him—freely, willingly, albeit unwittingly, and without restraint.



Continental Photo Service

Benedict M. Holden is a graduate of Yale (B.A. 1931, LL.B. 1934) and a partner in a Hartford law firm. He served in World War II with the 14th Anti-aircraft Command, retiring from the Army in 1947 in the grade of colonel. He is the editor of the monthly publication of the Hartford County Bar Association and Editor-in-Chief of the Connecticut Bar Journal.

The Thirty-fourth Annual Meeting of The American Law Institute

More than 600 members and guests discussed the *Restatement of the Law,* the Model Penal Code, and the Foreign Relations Law of the United States at the thirty-fourth Annual Meeting of The American Law Institute in Washington, D. C., on May 22, 23, 24 and 25. The Chief Justice of the United States addressed the opening session and Dillon Anderson, former Special Assistant to the President of the United States and a member of the Institute's Council, was the principal speaker at the Annual Dinner of the Institute.

At the first session, the President of The American Law Institute, Harrison Tweed, presented to the Chairman of the Council of the Institute and its former President, Senator George Wharton Pepper, a medallion of the Senator specially struck for the occasion and fashioned by the noted sculptress, Miss Eleanor Platt. Mr. Tweed noted that the medal represented some of the affection and regard had for Senator Pepper by the members of the Institute. Mr. Pepper served the Institute as President for some eleven years and as Chairman of the Council since 1947.

In his address, Chief Justice Warren reviewed the work of the Judicial Conference and its importance in eliminating congestion of court calendars. The Chief Justice also reported on the condition of business in the federal courts. He noted that the number of cases being docketed is still increasing. In the Supreme Court of the United States this year the number of cases on the appellate and miscellaneous dockets increased by forty-three; some twenty more cases were argued; and 1340 cases had been disposed of by May 17 as compared to 1300 for the same date in the previous year. The Chief Justice in concluding said that "We are within striking distance of good administration in most districts and circuits, and with united effort we should be able to make progress throughout the year."

Four subjects of the *Restatement of the Law* were discussed at the meeting: Agency, Conflict of Laws, Torts and Trusts. The Restatement work of The American Law Institute is now concerned with a revised and enlarged edition of the original *Restatement of the Law.* The new edition, to be known as the *Restatement of the Law, Second,* will reflect a re-examination of all the propositions stated in the original volumes, with revisions and additions where developments of the law since the first edition require such changes. In addition, the comments are being expanded to state more fully the reasons for the black-letter text and where appropriate, cases and other authorities are being cited. Each subject in the new edition will contain "Reporter's Notes" which will cite the Reporter's authorities and, in some instances, state his reasoning. The plan is to make the *Restatement* as published in its new edition a more useful and helpful tool for the practitioner.

This meeting of the Institute saw the completion of the work on the *Restatements, Second,* of Agency and Trusts. The Reporter for Agency as revised and enlarged is Professor Warren A. Seavey of Harvard and the Reporter for Trusts in the new edition is Professor Austin W. Scott, also of Harvard and the Reporter for the original edition of the *Restatement of the Law* on this subject. Publication of the *Restatement, Second,* of each of these subjects will in all probability be announced sometime in the fall or early winter of 1957.

The other two subjects discussed at the meeting in the Restatement field were conflict of laws and torts. The Reporter for the former is Professor Willis L. Reese of the Columbia University Law School and the Torts Reporter is Dean William L. Prosser of the Law School of the University of California. The torts' material for the new edition was presented for the first time at an annual meeting and was concerned with the initial chapters of the four volumes of the original edition. The discussion dealt with intentional invasions of interests in personality, privileges based on consent, self-defense, matters of arrest and prevention of crime, and military orders, discipline and protection of others. The conflict of laws' material was concerned with jurisdiction and with material involving status problems arising in the fields of marriage and divorce,

adoption and legitimacy.

Professor Herbert Wechsler of Columbia University Law School presented to the meeting Tentative Draft No. 7 of the Model Penal Code. This is a ten-year project of The American Law Institute to draft an up-to-date code of criminal law reflecting the latest thoughts on the subject by lawyers, sociologists, psychiatrists, prison administrators and others concerned with criminal conduct. Tentative Draft No. 7 deals with the youthful offender and covers the subjects of immaturity excluding criminal conviction, and sentencing and treatment of the young adult offender. The draft contains a special report on the California Youth Authority and the Model Penal Code prepared by Associate Reporter Paul W. Tappan of New York University's Law School.

The other draft on the Model Penal Code which was discussed dealt with the subject of obscenity and perjury and other falsification to authorities. The Reporter for this draft is Professor Louis B. Schwartz of the University of Pennsylvania Law School. The drafts on the Model Penal Code and most other drafts published by The American Law Institute contain, in addition to the text of proposed statutory or black-letter material, the comments prepared by the Reporters together with authorities relied upon by them.

Adrian S. Fisher presented to the meeting the first material on the Foreign Relations Law of the United States project. Mr. Fisher is the Chief Reporter for this work. His staff includes as Chief Adviser, Professor Edwin D. Dickinson, of California; as Associate Reporters, Covey T. Oliver of the University of Pennsylvania Law School, Cecil J. Olmstead of the New York University School of Law, and I. N. P. Stokes of New York City; and as Consultants, Joseph M. Sweeney of the New York University School of Law and Guenter Weissberg of New York City.

The draft presented, Tentative Draft No. 1, covered the initial subjects of the meaning of jurisdiction and bases of jurisdiction. The Foreign Relations Law of the United States, according to the Chief Reporter, covers "*both* (1) international law, as that term is used to describe the legal aspect of the relations between nations, and (2) that part of the domestic law of the United States including the constitutional law of the United States, which is concerned with the manner in which the United States conducts its foreign relations".

The first draft has been called "A Restatement" but it is not yet certain whether the results of this project will constitute part of the *Restatement of the Law*. This will depend in part on how future material shapes up as a result of further investigation by the Reporter and his associates.

As presently planned, the Foreign Relations Law of the United States study will consist of four parts. The first part will deal with jurisdiction. Part II will deal with treaties and other international agreements. Part III will deal with the legal effects of recognition or non-recognition of new states and governments. And, Part IV will deal with the protection of aliens and of foreign investments in the United States and United States nationals and investment in other countries.

The Annual Dinner of the Institute brought to the members as principal speaker, Dillon Anderson, a member of the Council of the Institute and formerly Special Assistant to the President of the United States. Mr. Anderson stressed the importance of world opinion expressed in the General Assembly of the United Nations as part of his larger theme of world law and order. President Tweed presided at the dinner and introduced Judges Goodrich and Hand to recount to Institute members and their guests some of the early history and experiences of the Institute. Judge Herbert F. Goodrich is the Director of The American Law Institute and Judge Learned Hand is a former Vice President of the Institute.

Harrison Tweed

At its meeting, the Institute gave final approval to the 1957 edition of the Uniform Commercial Code on which the Editorial Board of the Institute and the National Conference of Commissioners on Uniform State Laws had been working for the past two years. The Institute also elected to its Council as a new member Eugene V. Rostow, Dean of the Yale Law School.

The various addresses, including the remarks at the opening session of the Institute meeting and at the Annual Dinner, and the discussion of each of the subjects by the Reporters and the members of the Institute and their guests at the meeting, will appear in the published proceedings of The American Law Institute. Publication of the Proceedings of the Institute were resumed last year after a lapse of some ten years. The volume on this year's meeting is expected to be available in the fall of 1957. It, as well as the various drafts discussed at the meeting, may be obtained from The American Law Institute, 133 South 36th Street, Philadelphia 4, Pennsylvania.

The Butler Amendment:

An Analysis by a Non-Lawyer

by John R. Schmidhauser · *Assistant Professor of Political Science, State University of Iowa*

The so-called Butler Amendment deals with the Supreme Court of the United States. It would fix the number of Justices at nine, provide for compulsory retirement of members of the Court at the age of 75, prohibit members of the Court from running for President, and secure the appellate jurisdiction of the Court in all cases arising under the Constitution. The provisions of the amendment, several of which have been endorsed by the House of Delegates of the Association, might easily work a considerable alteration in future history if it is adopted. Mr. Schmidhauser examines the proposal and the arguments pro and con.

The much publicized and highly controversial treaty-making proposal of Senator Bricker was not the most successful of the amendments considered by the 83d Congress. For while public attention and controversy centered on the Bricker Amendment, Senator John Marshall Butler successfully piloted through the Senate an amendment dealing in several important respects with the composition and jurisdiction of the Supreme Court. The Senate approved this proposed amendment on May 11, 1954, by the substantial margin of 58 to 19. The House Judiciary Committee, however, did not act upon it before the adjournment, *sine die*, of the 83d Congress. On February 15, 1955, Senator Butler introduced a new version of this amendment for the consideration of the 84th Congress.[1]

What is the purpose of this amendment? Are the alterations in the composition and appellate jurisdiction of the Supreme Court justified by historical experience and future necessities? What are the underlying assumptions of the originators of this proposal concerning the nature of constitutions and the role of the federal judiciary? What implications do these assumptions and the proposals premised upon them have for subsequent American constitutional development? These questions are basic to an analysis of the Butler Amendment.

The amendment originally introduced by Senator Butler on February 16, 1953, contemplated four distinct alterations designed to fix the number of members of the Supreme Court at nine, to compel the retirement of Supreme Court justices at the age of seventy-five years, to prevent congressional manipulation of the Supreme Court's appellate jurisdiction in all constitutional cases, and finally, to make ineligible for the Presidency or Vice Presidency any member of the Supreme Court within five years of the termination of his service on the Court.[2]

The rationale for this amendment finds its clearest statement in the testimony of Senator John Marshall Butler, retired Supreme Court Justice Roberts, and several representa-

1. The new version, embodied in Senate Joint Resolution 45, contains the following provisions:

Section 1. The Supreme Court shall be composed of a Chief Justice of the United States and eight Associate Justices of the Supreme Court in regular active service.

Section 2. The Chief Justice of the United States and each Associate Justice of the Supreme Court shall cease to serve and shall no longer be eligible to serve as a member of the Supreme Court upon attaining the age of seventy-five years, but shall continue to receive all of the emoluments of his office.

Section 3. In all cases affecting Ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all cases arising under this Constitution the Supreme Court shall have appellate jurisdiction, both as to law and fact. In all other cases mentioned in the first paragraph of section 2 of article III of this Constitution the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make.

Section 4. The second paragraph of section 2 of article III of this Constitution is hereby repealed.

Section 5. No person hereafter becoming Chief Justice of the United States or Associate Justice of the Supreme Court shall be eligible to serve as President or Vice President of the United States while in regular active service or within five years after ceasing to be in regular active service as Chief Justice of the United States or Associate Justice of the Supreme Court.

Section 6. Each judge of any inferior court of the United States entitled to hold office during good behavior shall cease to render regular active service in such office upon attaining the age of seventy-five years, but shall continue to receive all of the emoluments of his office.

Section 7. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by Congress.

2. *Hearing*, Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, January 29, 1954, page 1.

tives of various bar associations before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee.[3]

The Size of the Court . . . *Congressional Alteration*

With regard to the first section, which fixes the size of the Supreme Court at nine, protagonists of the Butler Amendment pointed out, with unquestioned historical accuracy, that on several occasions Congress attempted to alter the size of the Court in order to influence future judicial decisions. Three major efforts of this kind were made, two of which were unsuccessful.

The first judiciary act, that of 1789, had established six as the size of the Supreme Court.[4] After Jefferson's election victory in 1800, the "lame-duck" Federalist Congress passed a Judiciary Act which provided for a reduction in the Supreme Court's membership to five after the next vacancy.[5] The obvious legislative intention was to deny to Jefferson a judicial appointment.[6] This purpose was thwarted in the following year when Congress, now dominated by Jeffersonian Republicans repealed the Federalist Act.[7] The second major effort by Congress to change the size of the Court for essentially political purposes was successful. In 1863 the size of the Court had been increased to ten members.[8] However, three years later a Radical Republican Congress passed an act reducing the Court's size to seven in order to curtail President Andrew Johnson's appointing authority.[9] The third and most recent attempt at congressional manipulation of the size of the Supreme Court was the result of presidential instigation. In 1937, President Franklin D. Roosevelt submitted a court reorganization plan to Congress which was designed to permit enlargement of the size of the Court to ostensibly meet the problems of "insufficient personnel" and superannuated justices. This proposal was resoundingly defeated in Congress.

Advocates of the Butler Amendment placed particular emphasis upon the court reorganization controversy of 1937 in order to illustrate that the danger to judicial independence arising from congressional power to alter the size of the Court is of more than historical interest. However, the outcome of that controversy, the stunning defeat of President Roosevelt by a Congress dominated by his own party, instead of underscoring the need for constitutional amendment, would point up the absence of such need. Constitutional historians have, of course, noted the elements of poor generalship which contributed to the President's defeat. But they have also emphasized the substantiality of the public as well as congressional opposition to the reorganization plan. The basis for this opposition is summed up in the unfavorable report of the Senate Judiciary Committee made on June 14, 1937. This report contended that the reorganization bill "undermined the independence of the Court (s)" in violation of "the spirit of the Constitution". The Senate later rejected the bill by the significantly large margin of 70-20.[10] Thus it appears that the events of 1937 show quite conclusively that barring a crisis more serious than the one of that year, the tradition of judicial independence is sufficiently strong to prevent legislative interference with the size of the Court.

Supporters of the Butler Amendment before the Senate subcommittee did not consider the question whether the President's action in 1937 was constitutionally justified. It has been pointed out that the court reorganization plan was designed to protect the constitutionally legitimate spheres of executive and legislative authority against arbitrary interference by the judiciary.[11] With respect to situations of this kind, retention of congressional power to alter the size of the Supreme Court could be highly desirable.

A considerable portion of the testimony and information presented to the Senate subcommittee concerning the size of the Supreme Court centered on the question whether nine was the optimum number in terms of judicial efficiency.[12]

The writings of Charles Evans Hughes and Owen Roberts purportedly gave expert support to advocates of the number nine. Obviously, few would quarrel with the considered judgment of so eminent a judicial administrator as the late Chief Justice Hughes, yet it should be remembered that Hughes' arguments were raised during the court reorganization controversy of 1937. In his letter to Senator Wheeler that year, Hughes never intimated that nine Justices would suffice for all time; he simply pointed out that in the light of a number of factors such as the size of the docket of the Court in the 1930's, judicial efficiency would not be enhanced by the addition of more justices.[13]

The question whether nine members of the Supreme Court will be sufficient in 1970, 1990 or 2130 was not explored by supporters of the proposed amendment. Consequently, the objection that there is nothing "magical" about the number nine[14] was well taken, particularly if one considers the Constitution as a charter of government for the unpredictable future.

The real question is, of course, not whether nine, twelve or fifteen justices can best handle the annual

3. Leonard D. Adkins, Albert E. Jenner, Jr., Edward E. Murane, Henry W. Nichols, all members of the American Bar Association; Harrison Tweed, President of the American Law Institute; Fredrick W. Brune, member of the Maryland State Bar Association; and William C. Walsh, former Attorney General and Judge of the State of Maryland .

4. *1 Stat.* 73, §1.

5. Judiciary Act of February 13, 1801, 2 Stat. 89, §3.

6. Max Farrand, "The Judiciary Act of 1801," 5 AMERICAN HISTORICAL REVIEW, 682-685.

7. March 8, 1802, 2 Stat. 132, §1.

8. 12 Stat. 794 §1.

9. Act of July 23, 1866, 14 Stat. 209, c. 210, §1.

10. Kelley and Harbison, *The American Constitution*, pages 743-753; Carl B. Swisher, *American Constitutional Development*, 1st ed., pages 939-946.

11. See Robert H. Jackson, *The Struggle for Judicial Supremacy* for a full discussion of this problem.

12. *Hearing, op. cit.*, pages 9-13.

13. This letter was incorporated as supporting evidence for the proposed Butler Amendment, *Hearing, op. cit.* pages 10-13.

14. This objection was made by Senator Hennings in Senate debate, *Congressional Record*, 83d Congress, Second Session, Vol. 100, No. 86, page 5993.

workload of the Supreme Court, but whether the size of the Supreme Court should be fixed rigidly by constitutional amendment. History indicates that Congress has, on occasion, altered or attempted to alter the size of the Supreme Court to influence future decisions. Such use of congressional power represents an interference with judicial independence. However, history also indicates, particularly in the events of 1937, the growth and strength of public as well as legislative support for the tradition of judicial independence. It may well be that supporters of the Butler Amendment are attempting to rigidly formalize by constitutional amendment a tradition which is already a constitutional understanding. A possible danger which might arise from such rigid formalization is that under certain circumstances, congressional power to alter the size of the Court could be sorely needed to avert a constitutional breakdown during a period of severe economic, social or political crisis.

Compulsory Retirement . . . *Judicial Conservatism*

Shortly after President Franklin D. Roosevelt's Supreme Court reorganization plan was rejected by Congress in 1937, Professor Charles Fairman, in an article in the *Harvard Law Review*, discussed the potentialities of compulsory retirement of Supreme Court members as a possible solution for the recurring problem of judicial conservatism.[15] This article stimulated intelligent discussion but did not provoke immediate action by Congress. In 1948, however, several members of the American Bar Association began serious reconsideration of the problem of retirement as part of a broader study intended to determine ways and means to insure the continued independence of the federal Supreme Court.[16] The results of this study were incorporated in the Butler Amendment. Section 2 provides that,

> The Chief Justice of the United States and each Associate Justice of the Supreme Court shall cease to serve and shall no longer be eligible to serve as a member of the Supreme Court upon attaining the age of seventy-five years, but shall continue to receive all the emoluments of his office.

Albert E. Jenner, Jr., in a statement presented before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, rationalized the retirement provision as insurance "against physical and mental impairment of individual justices . . ." and as "assurance against stagnation of particular economic, political, social or philosophical thought on the part of the Court".[17] Thus, the compulsory retirement provision was designed to remove one of the major sources of criticism of the Supreme Court in the past, namely, that members of the Court (many of whom tended to read their personal, social and economic predilections into the Constitution)[18] were frequently out of step with the times.[19]

In order to gain perspective regarding such a retirement proposal, it should be first clearly understood that none of the existing arrangements for removal, retirement or resignation of members of the Supreme Court offer adequate solutions to the problems of judicial conservatism or senility.

The Constitution provides that "the Judges, both of the supreme and inferior courts, shall hold their offices during good behavior. . . . ."[20] Death accounts for most of the vacancies which occur.[21] The only constitutional provision for removal of justices from the Supreme Court is that of impeachment. But impeachment does not meet the problems of ideological stagnation or senility on the Court because, unless abused, the impeachment power applies only to Justices who have committed high crimes and misdeameanors. The last attempt to make impeachment of members of the Supreme Court a political sanction, in the case of Justice Samuel Chase, was defeated in 1805.[22] Since that date, no serious efforts at political removal have occurred.

Two voluntary institutional devices, retirement and resignation, have been available to members of the Supreme Court for a number of years.[23] The statute governing these matters provides adequately for

Friendship Photo

John R. Schmidhauser is a graduate of the University of Delaware (B.A. 1949) and the University of Virginia (M.A. 1952, Ph.D. 1954). Since 1954 he has been an instructor in Political Science at the State University of Iowa. He is a member of the American Political Science Association.

15. "The Retirement of Federal Judges," 51 *Harvard Law Review*, (January, 1938), pages 397-443; as early as 1928, Charles Evans Hughes included a brief but candid discussion of compulsory retirement in his *The Supreme Court of the United States*.

16. See the prepared statement of Albert E. Jenner, Jr., *Hearing on the Butler Amendment*, Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, pages 20-21.

17. *Ibid.*, page 21.

18. See, for example, Justice Holmes' classic dissent in *Lochner* v. *New York*, 198 U.S. 45 (1905).

19. For a concise and accurate account of the major conflicts which arose because of this problem see Fairman, *op. cit.*, pages 401-405.

20. Article III, section 1.

21. Forty-eight of the eighty-nine individuals who served on the Supreme Court died while in active service; this information was compiled from Professor Spahr's table of Justices found in Noel I. Dowling, CASES ON CONSTITUTIONAL LAW, pages 1257-1263.

22. Andrew C. McLaughlin, A CONSTITUTIONAL HISTORY OF THE UNITED STATES, pages 321-324.

23. 16 Stat. 44 (1869); currently, Title 28, chapter 17, subsection 371, of the U.S. Code provides full pay for court members who retire or resign after attaining the age of seventy and after completing ten years' service.

those justices who presumably might be deterred from retirement and resignation because of financial considerations. But most members of the Court who have refrained from utilizing these avenues to private life or who have long delayed such utilization were not motivated by economic considerations. Professor Fairman's researches indicate that some members of the Court clung to their posts in spite of senility because they hoped to prevent appointments by Presidents whom they distrusted or whose political beliefs they opposed. Others refrained from retiring or resigning because they feared the inactivity of retirement,[24] or because of the desire to "establish an endurance record".[25] After completing a detailed analysis of the Supreme Court's experiences with voluntary retirement and resignation,[26] Professor Fairman concluded that "For the most part the justices have seen fit to follow the American plan of living—to carry on to the end."[27]

Thus it appears that neither the legal sanction, impeachment nor the present modes of retirement and resignation, which are voluntary, provide realistically workable methods for removing justices who have become either senile or wholly out of step, ideologically, with the times. In this setting, a compulsory retirement plan, although admittedly arbitrary, has been viewed by some, such as the supporters of the Butler Amendment, as the only practical alternative to situations in which mentally or physically infirm Justices remained on the Court or in which justices nurtured in earlier times steadfastly opposed the legislative and executive actions of a new constitutional era.

Cogent Arguments . . . *But Is That All?*

While the arguments for such a compulsory retirement amendment are admittedly cogent, several questions demand attention. The first of these questions concerns the validity of the assumption that poor physical and mental health is a concomitant of old age.[28] This assumption finds support in a great deal of historical evidence, although advocates of compulsory retirement did not produce such evidence at the Senate subcommittee hearing in which the major arguments for the Butler Amendment were presented. Instances in which members of the Supreme Court remained in regular active judicial service long after their mental and physical powers had become impaired are numerous. Justices Baldwin and Clifford deteriorated mentally during the later portions of their judicial terms; Justice Duval suffered from deafness, a serious problem in a period during which the Court relied heavily upon extended oral argument; Chief Justice Chase suffered a stroke and paralysis during the closing years of his tenure; and Chief Justice Taney and Justices McKinley, McLean, Wayne, Catron, Grier, Nelson, Hunt, Bradley and Field all became physically infirm during the sunset of their judicial careers.[29] Obviously, this historical evidence is incontrovertible. What remains for examination, however, is the question whether recent and rapid advances in the science of geriatrics have contributed new insights concerning the relationship of old age and mental and physical impairment. This question was not explored by supporters of the Butler Amendment.

Research in geriatrics is, admittedly, fragmentary. Nevertheless, the studies that have been made indicate that the average life expectancy at birth has increased from 49 years to 68 years during the past half century.[30] Statistics also indicate that the incidence of illness is higher among the aged than among other population groups.[31] Of particular significance is the finding that "while psychological characteristics of age are declines in the speed of mental processes as well as speed in manual dexterity . . . there is a significant variation in the rate of those changes among individuals." Thus, "changes in functional capacities, both physical and mental, in time, do not correlate with chronological age".[32] In short, the assumption that there is a necessary relationship between old age and poor mental and physical health finds some support in the finding that the incidence of illness is higher among the aged, but may be termed an over-generalization because it fails to take into account individual differences and fails to assess the importance of other factors such as heredity or the demands of different vocations.

The second assumption which provided a basis for advocacy of the Butler Amendment involved acceptance of the premise that there is a necessary relationship between old age and out-dated ideas. This assumption has had widespread support for many centuries, but science remains unconvinced that it is a valid one. The belief that older persons are more conservative in their attitudes and opinions has not always been upheld in experimental studies.[33] Research has indicated that the aged can learn, and learning can open the way to acceptance of new ideas. Psychological tests of speed of performance (both mental and physical) provide evidence that older people are more careful and accurate than younger ones. Consequently, what is frequently referred to as the "conservatism" of the aged "may relate to their tendency to be more deliberate rather than to inherent inflexibility".[34]

The history of the Supreme Court reveals, moreover, that some members of the Court retained the capac-

(Continued on page 761)

24. For example, Justice Brewer contended that he would "lose his mind" if he left the Bench; from the autobiographical sketch of Justice Brown, quoted in Fairman, *op. cit.*, page 429.
25. Here Fairman referred to Justice Field, *ibid*, page 427.
26. *Ibid.*, pages 405-430.
27. *Ibid.*, page 430.
28. Jenner's statement, *Hearing*, page 21.
29. Fairman, *op. cit.*, pages 405-430.
30. *Fact Book on Aging*, Committee on Aging and Geriatrics, Federal Security Agency, page 36.
31. *Ibid.*, pages 38-39.
32. Quoted from the letter of Mrs. Georgia F. McCoy, Special Assistant on Aging, Department of Health, Education and Welfare, February 24, 1955.
33. See, for example, Otto Pollak, "Conservatism in Later Maturity and Old Age", 8 AMERICAN SOCIOLOGICAL REVIEW, (1943), pages 175-179.
34. McCoy, *op. cit.*

The International Court of Tangier:

A Unique Instrument of International Justice

by Juan A. A. Sedillo · *American Judge of the International Court of Tangier*

■ Tangier is a city of about one hundred thousand, located on the extreme northwest tip of Africa on the Strait of Gibraltar. A very ancient city, Tangier and the surrounding territory is ruled by an international commission. This unique status presents an unusual legal situation which Judge Sedillo describes. Since this article was written an international conference was held last October in Fedala and Tangier, Morocco, to decide the integration of Tangier into the sovereign state of Morocco.

■ The ancient city of Tangier in Morocco, which has been held by the Vandals, Byzantines, Arabs, Romans, Portuguese, Spaniards, English and Moors, has been an international city since the turn of the century and its courts offer an interesting subject of study for lawyers.

American citizens enjoy extraterritorial judicial rights that date back to treaty arrangements made between the United States and the Sultan of Morocco in 1787. An American consul, acting in a judicial capacity, exercises jurisdiction in criminal and civil matters, in conformity with the laws of the United States. Appeals from his judgments lie to the American Minister to Morocco.

The representative of the Sultan of Morocco in Tangier, the *Mendoub,* governs the indigenous population. He exercises spiritual as well as temporal power, including judicial authority over Moorish subjects.

The Jewish community, which is substantial, is subject to the Moorish court but also maintains a Rabbinical court which has jurisdiction over certain personal affairs among its people, such as marriages, divorces, religious conversion and the law of succession.

The "rest, residue and remainder," one might say, of the judicial authority of the International Zone of Tangier is vested in the International Court, which has jurisdiction over all foreigners other than American citizens, and all natives whose civil disputes are with foreigners, or whose actions transgress the codes of Tangier.

These codes are: one respecting the civil status of foreigners in the Zone; a commercial code; a penal code; a code of criminal procedure; a code of obligations and contracts; a code of civil procedure; and a land registration code. They are patterned on French and Spanish law.

In 1952, the International Court was enlarged to twelve judges of ten nationalities. There are two French and two Spanish members, and one each from Belgium, Holland, Italy, Great Britain, Morocco, Portugal, Sweden and the United States.

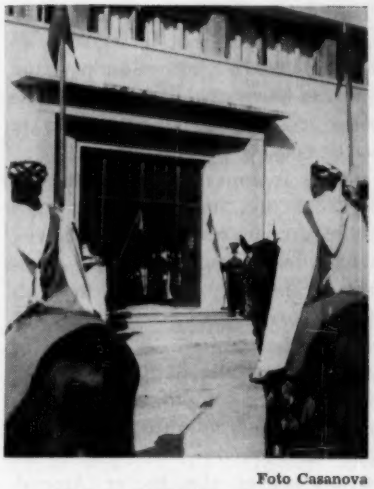


Foto Casanova

Palace of Justice, Tangier

The court is organized into a Court of Appeals (four judges, three of whom sit on the panel); a Correctional Court of three judges, with penal jurisdiction up to six years' imprisonment; a Civil Court of three judges; a Justice of the Peace who also sits as Police Magistrate; and a *juge d'instruction* (committing magistrate). The assignment of members on these various tribunals, except for one French

Juan A. A. Sedillo has been a judge of the International Court of Justice in Tangier since 1953. A native of New Mexico, he is a member of the New Mexico and California Bars. He practiced law in Santa Fe from 1926 to 1936, and was an actor in Hollywood from 1928 to 1929. He was in the Army in World War II, rising from captain to colonel.

and one Spanish judge who sit permanently on appeal, is determined annually by rotation, based upon length of service or, in cases of equal length of service, on the age of the judges. There is also a Criminal Court of three judges, consisting of a member of the Court of Appeals as Presiding Judge, two members of the courts of first instance, and a jury of six male residents of Tangier. The jury is selected by ballot from lists submitted by the *Mendoub* for the native population (Jews and Moslems separately), and names of resident foreign nationals submitted by the Ministers of the eight governing Powers of the International Zone. Three members of the jury must be of the same nationality as the accused. The Criminal Court tries cases which involve the death penalty or imprisonment in excess of six years. (There is not much serious crime, despite Tangier's unpleasant reputation abroad, and the shades of pirates, corsairs and the Barbary Coast.)

The work of the International Court is done in the courthouse of Tangier, called the "Palace of Justice" (it is neither stately nor splendid). Every day of the week one of the various panels is in session in one of the two courtrooms. An American visitor, especially one versed in the work of law courts, would be struck, first of all, by the apparent informality of the trial procedure used. The presiding judge does all, or almost all, of the examination of witnesses (the judges are required to study the entire file before trial, including investigation reports and the antecedents of the accused in criminal cases). Cross-examination is unknown. There are virtually no rules of evidence, as we know them. An accused person may be tried *in absentia*. A court may award damages in a criminal case (a very practical rule). A convicted person always has the right to appeal, but so does the prosecution. In fact, the prosecution may even appeal an acquittal! In jury trials the three judges participate with the six jurors in the finding. The majority rules. The sentence, however, is determined by the judges alone, also by majority. This procedure is true even when capital punishment is imposed (execution is by rifle fire).

The authors of the Codes have not been squeamish in dealing with certain so-called unwritten laws. In case of adultery, for example, the statute defines as "excusable" the killing of a wife, as well as "her accomplice", when hubby discovers them *in flagrante delicto*. However, the same rules does not apply to the wife.

Perhaps more interesting to the average visitor, however, would be the picturesque human aspects of the courts in action. The police of Tangier, recruited from many nationalities, are colorfully dressed. The Berbers and the Arabs wear their native garb. All the Moslem women wear veils. Each judge wears the judicial robe of his own country, plus a broad silk sash of red and green (the Sultan's colors) across his chest, and any ribbons or medals which he may possess. The clerks, bailiffs and interpreters are also gowned. So are the attorneys. Although Spanish and French are the official languages, Arabic is predominant and all languages may be heard, since Tangier is a sort of Babel.

Like every other community, Tangier has legal problems peculiar to its own environment. Unlike most nearby countries across the Mediterranean, there are no currency controls in Tangier, and practically no taxes. Consequently banks and corporations abound. Lawsuits and bankruptcy proceedings are frequent and sometimes considerably involved. Besides the usual run of offenses committed everywhere, Tangier has more than its share of smuggling and theft. Two Danes were recently tried for stealing a yacht. Two Italians were convicted of counterfeiting British gold sovereigns (gold, in coins or bullion, may be purchased openly in Tangier). A Spanish doctor who practiced medicine by day was found guilty of practicing piracy by night. A "narrator of tales" in the market place, who looked like a character out of a Biblical scene, confessed to picking pockets as a side-line. A highly stimulated member of an ancient profession came before the court, not for practicing her trade, which is an authorized occupation in Tangier, nor for being in possession of *kif* (marihuana), which is also authorized, but simply for tapping a customer over the head with a bottle of Coca-Cola. "Death in the Afternoon" was turned into good comedy when a rabid fan jumped into the local *Plaza de Toros* and took over from the *matador*.

A hundred years ago a distinguished diplomat made the following observation, which is fairly accurate today:

> Here at once, in a three hours' sail from Gibraltar, you are transported, as if by enchantment, a thousand or two thousand years back, and you find yourself among the same people and the same style of living as you read of in the Scriptures. The Bible and the "Arabian Nights" are your best handbooks, and would best prepare you for the scene.

AMERICAN BAR ASSOCIATION

Journal

TAPPAN GREGORY, *Editor-in-Chief* .....Chicago, Ill.
LOUISE CHILD, *Assistant to the Editor-in-Chief*....Chicago, Ill.

BOARD OF EDITORS

E. J. DIMOCK .....New York, N. Y.
ROBERT T. BARTON JR. .....Richmond, Va.
ALFRED J. SCHWEPPE .....Seattle, Wash.
GEORGE ROSSMAN .....Salem, Ore.
RICHARD BENTLEY .....Chicago, Ill.
EUGENE C. GERHART .....Binghamton, N. Y.
ROY E. WILLY .....Sioux Falls, S. Dak.
CHARLES S. RHYNE, *President of the Association* .....
.....Washington D. C.
Chairman of the House of Delegates .....
HAROLD H. BREDELL, *Treasurer of the Association* .....
.....Indianapolis, Ind.

General Subscription price for non-members, $5 a year.
Students in Law Schools, $3 a year.
American Law Student Association members, $1.50 a year.
Single copy price, 75 cents; to members, 50 cents.

EDITORIAL OFFICES

1155 East 60th Street .....Chicago 37, Ill.

Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

Treaty Law in an Atomic Age

In a world of more and more treaties—and, parenthetically, breaches thereof—the treaty portion of the "supreme law clause" of the United States Constitution assumes larger and larger importance, especially in its impact on the laws of the individual states and on the rights of private citizens. Many aspects of the problem have been discussed, pro and con, in previous issues of the JOURNAL and in recent United States Senate hearings.

In this issue Mr. Eberhard Deutsch presents in the unique form of a hypothetical Supreme Court opinion the constitutional issue presented in a United States court condemnation of private property by an international agency created by treaty to control the world-wide use of atomic energy. Mr. Deutsch's conclusion that the courts of the United States will not grant any relief to an American citizen whose property is expropriated against his will by such a treaty-born international agency makes provocative reading.

Be a Better Lawyer Tomorrow!

The Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association has just announced that approximately 200,000 lawyers are now using the Committee's "How-To-Do-It" handbooks. This means sales are at the rate of 2500 books per month. Lawyers are buying these inexpensive books which average only 150 pages because they are well written and are helpful not only to lawyers in metropolitan practice, but also to the country lawyers at the grass roots of American law practice.

Unless a lawyer, like a doctor, keeps up to date in his profession, he inevitably falls behind. It is hard for any organization, including a law office, which is content to remain static to hold its own with its competitors over any appreciable period of time. A progressive lawyer resolves that his office and his education will be better when he closes his office door each night than it was when he opened it that morning.

At one time the buggy business was a flourishing, lucrative occupation. It supported blacksmiths, harness makers and manufacturers of buggy whips. Yet when most of us were reading Mr. Justice Holmes' opinion in *Hobbs* v. *Massasoit Whip Co.* in law school, we already regarded the case of the eel skins which were to be made into whips as an anachronism. The invention of the automobile dried up the market for buggy whips. Bankruptcy inevitably awaited the buggy whip manufacturer who did not recognize the inexorable march of time. Mental bankruptcy awaits the lawyer who does not keep up to date with the developments in his profession. The keener men of our profession will soon pass him and leave him in the lurch. So will his client.

Some 200,000 American lawyers are continuing their educations through the use of these bread-and-butter handbooks published by the American Law Institute and similar ones published by the Practicing Law Institute. These wise men are aware that education is a lifelong process, not a status that can be attained once and for all. They know that their licenses to practice law are not passports to success. It was Dean Pound, one of America's true geniuses in the law, who wrote that "Law must be stable, and yet it cannot stand still." Neither can a good lawyer. Legal education is a never-ending process. And therein lies one of the great fascinations of our Lady, the Law!

Editor to Readers

Elmore Whitehurst, who has been Assistant Director of the Adminstrative Office of the United States Courts for seventeen years, has resigned and returned to Dallas, Texas, to become referee in bankruptcy for the United States District Court for the Northern District of Texas.

Mr. Whitehurst entered upon his new duties July 1.

A Preliminary Report:

The 1957 Annual Meeting

The three days of the New York portion of the 80th Annual Meeting of the American Bar Association will probably be remembered as the shortest two weeks in the life of everyone who was there. By any method of measuring time other than a calendar, July 14, 15 and 16 were at least two weeks long for the lawyers who registered for the Association's 1957 Annual Meeting.

New York, of course, was only half of the Annual Meeting, merely a curtain raiser for the London pilgrimage which is certain to be one of the most memorable events in the Association's history. But no one in New York behaved as if he were attending a preliminary. The host bar associations managed somehow to cram a whole week's entertainment and hospitality into Sunday, Monday and Tuesday, and the amount of work done by the various Sections, Committees and other groups of busy, hard-working lawyers would have done credit to any ordinary Annual Meeting when there is twice as much time available.

Appropriately enough, this international meeting of the Association began with a Special Convocation in the General Assembly Hall of the United Nations, where more than 2000 lawyers and their families heard addresses by Leslie K. Munro, the New Zealand Ambassador to the United States, and James J. Wadsworth, United States Deputy Ambassador to the United Nations

There were three Assembly sessions in New York. The first was held Monday morning, July 15, when President David F. Maxwell, of Philadelphia, Pennsylvania, delivered the President's Annual Address. The Annual Dinner, which traditionally comes at the close of the meeting, was moved up to Monday evening this year because of the London pilgrimage, and was combined with the dinner in honor of the judiciary which the Section of Judicial Administration sponsors each year. At the dinner, the American Bar Association Medal was presented to William Clarke Mason, of Philadelphia. At the third session of the Assembly on Tuesday morning, July 16, the President of The Canadian Bar Association, E. C. Leslie, Q. C., addressed the members and there was extended and at times spirited debate over some twenty resolutions introduced by Association members.

The House of Delegates, the Association's policy-making body, met twice in New York and considered a number of important matters. A complete account of the House's deliberations in New York and London will be carried in later issues of the JOURNAL.

Officially, the New York portion of the Annual Meeting lasted only three crowded days, but, as always, there were meetings of lawyers and legal organizations for a full week before the opening of the Association's meeting. The National Conference of Commissioners on Uniform State Laws met for its Annual Meeting on Monday, July 8; the National Conference of Bar Presidents met on Saturday, July 13; the Conference of Bar Secretaries met on Friday, July 12; and virtually all of the seventeen Sections of the Association held meetings in the week prior to July 14.

It is impossible to list all the distinguished speakers at the many conferences, work-shop sessions and dinners, but among them were Mr. Justice Clark and Mr. Justice Harlan, Under Secretary of State Christian Herter, Senator Jacob K. Javits of New York, Mayor Robert F. Wagner, Sir Hugh Stephenson, British Consul General in New York and Governor Robert B. Meyner of New Jersey.

No trip to New York would be complete without visits to the many fashionable shops, the theater and the restaurants and night clubs for which the nation's largest city is famous. This year, the ladies attending the meeting were treated to guided tours of Lord and Taylor, and whole families sailed around New York harbor aboard the *SS. Peter Stuyvesant* through the courtesy of the Port of New York Authority. And there were dozens of receptions and parties, formal and informal.

The New York meeting was exciting, exhuberant and exhausting. It was hard to remember that this was only the beginning.

London was still to come.

Books for Lawyers

STERLING-DOLLAR DIPLOMACY. *By Richard N. Gardner. Foreword by R. F. Herrod. New York: Oxford University Press. 1956 $6.75. Pages 423.*

This book reviews the history of the effort led by the United States and Great Britain to construct a cooperative international economic system during and after World War II.

Mr. Gardner, the author, is an American lawyer (a member of the New York Bar) and economist who began this work while a Rhodes Scholar. Due in part no doubt to his training in the law, he was able to analyze objectively and clearly the Bretton Woods Institutions, the Anglo-American Loan Agreement, the International Trade Organization and the General Agreement on Tariffs and Trade, state the purposes and hopes for each and the reasons for their failure.

This book is greatly simplified by the addition of a conclusion at the end of each chapter. A final conclusion briefly summarizing the entire book appears as a last chapter.

In this final chapter he states that these attempts were not total failures because they at least avoided the grave mistakes of the earlier post-war decade. Among the benefits he lists the fact that the United States did not return to isolationism; there were none of the wild currency disorders or violent fluctuations of the trade cycle; and a program of sustained recovery was begun.

He states that the major objective was the reconstruction of multilateral trade and that this was not achieved. He lists three main reasons for this failure: the necessity for a tolerable state of political equilibrium which could not exist in the midst of the political instability and threat of war brought on by the differences with the Soviet Union; the necessity for a reasonable state of economic equilibrium which could not be obtained because the planners did not foresee the full extent of the measures necessary to achieve such a balance; and the necessity for the adoption of appropriate internal and external policies by creditor and debtor nations to restore equilibrium in the balance of payments, which could not be obtained because the planners did not face up to the full implications of these facts for the policies of their own countries.

He states that there were three basic errors in post-war planning: The idea that economic policy could be made in a political vacuum which delayed the creation of political equilibrium; the idea that the post-war order could be created on a universal basis without alliances or any special arrangements between individual members of the world community, thus neglecting the central problem of British reconstruction and the special relationship between Britain and the United States; and the tendency to think that outstanding international problems could be resolved by drafting detailed codes of formal principles so that legal forms and documentary trappings became a substitute for collaboration and were not flexible enough to be adapted to future contingencies.

This leads to a "word of warning" by the author, namely, that there has been a tendency to depreciate the role of law in the conduct of international affairs. This tendency, he states, has led to many of the diplomatic failures. Law plays a major part in the settlement of differences whether international, national, political or economic, he states, for only a proper understanding and use of law can lead to a system of useful arrangements for the solution of human problems. Much of the misunderstanding and much of the failure was caused by the insistence on elaborate substantive rules and neglect of workable arrangements to meet changing conditions.

This book should be of interest to lawyers generally because it is, without intention on the part of the author, a powerful argument for the need of lawyers in the solution of substantive government problems in political and economic fields as well as the purely legal field of draftsmanship. As it was, such laymen as Harry Dexter White (whose work is not impugned in any way by the author) were the chief authors and draftsmen of these documents. Due to their inflexibility and failure to provide for unforeseen contingencies, the result was the Truman Doctrine and the Marshall plan and more recent events.

The book does not cover recent events; and logically there is no place for a discussion of the constitutionality of the United States Trade Agreements Act of 1934, of the executive approval of the General Agreement on Tariffs and Trade nor of the Organization for Trade Cooperation which is now being put forward as a substitute for the ill fated International Trade Organization.

BENJAMIN WHAM

Chicago, Illinois

CONSTITUTIONS OF NATIONS, SECOND EDITION. *Amos J. Peaslee, Editor. The Hague, The Netherlands: Martinus Nijhoff. 1956. New York: Justice House, 501 Fifth Avenue. $22.50 or 85.50 guilders. Three volumes, cloth bound.*

The collection, translation, editing and publication of "the first compilation in the English language of the texts of the constitutions of the various nations of the world, together with summaries, annotations, bibliographies, and comparative ta-

bles" was undertaken as a personal venture by Amos J. Peaslee in 1950, when the first edition of this uniquely valuable work appeared.

The editor was a successful practitioner of international law. His interest in this highly specialized branch of the law did not end with his arrival at the happy estate which is the hope of all practicing lawyers, that is, when they are no longer dependent upon their practice for bread and butter. Mr. Peaslee then decided to apply his fine abilities and some of his financial rewards to public service of a world-wide scope.

When the United Nations found the need in its legal and humanistic work for a compilation of the constitutions of its member states and was not in a position to undertake the job, Mr. Peaslee came to the rescue and organized a private group of some twenty-three authorities on constitutional and international law and literature to advise and co-operate with him in the work. All expenses, including the very heavy cost of publication, were assumed by Mr. Peaslee. Fortunately the compilation was a sell-out, and inability to meet all orders from prospective purchasers is one of the reasons for the present second edition. It has been brought up to date by incorporating major changes in the texts or status of the constitutions of thirty-five of a total of eighty-nine nations, including the addition of five new countries which have been recognized since 1950.

Mr. Peaslee signalized the broadening of his outlook on law beyond national boundaries by becoming Secretary General of the International Bar Association, after which he became President of the American Branch of the International Law Association with headquarters in London. He was a representative of the American Society of International Law at the San Francisco Conference which formulated the Charter of the United Nations. He was appointed by President Eisenhower and served as Ambassador of the United States to Australia and is now Deputy Special Assistant to the President.

The most significant phenomenon in the field of international law of the Atomic Age has been the intensified and universal belief that something more must be done to prevent another world war through the United Nations and its regional organizations. Many supporters of the United Nations believe and advocate that effective international co-operation to prevent war can be achieved only by the further development of that institution into some form of federal union or even world government. Literature and argument in support of these panaceas are usually lacking in essential basic materials to justify the conclusions of their proponents, except the natural desire of everybody to remain at peace. In the foreword to the first edition Mr. Peaslee states that "The present effort is intended for the use of persons primarily interested in present day problems of world government." Whether those problems can be solved will depend upon the existence or evolution, in the respective national communities it is proposed to merge, of conditions of cultural, economic and social life that are the essential prerequisites of closer political bonds.

To aid the researcher Mr. Peaslee has added to the texts of the constitutions a section of comparative tables showing for each of the 89 nations the form of its national government, whether federal or unitary, republican or monarchical; the sources of sovereign power, whether in the people or in the monarch; the rights of the people in matters of assembly and association, conscience and religion, inviolability of correspondence and domicile, education, equality, health and motherhood, individual liberty and fair legal processes, labor, movement within and without the nation, non-retroactivity of law, petition, property, social security, and freedom of speech and the press. Also indicated in the tables are the structures of the respective legislative, executive and judicial departments, including the tenures of office and methods of selection. A bibliography follows the constitution of each country.

The volumes should, as the editor hopes, be welcome among statesmen and public officials, lawyers and jurists, business men and labor leaders, educators and students who may be interested in the process of constitution building, national as well as international.

GEORGE A. FINCH
Washington, D. C.

READY FOR THE PLAINTIFF.

By Melvin M. Belli. New York: Henry Holt & Company, Inc. 1956. $6.50. Page 311.

For many years, the Bar limped along with few able books upon trial technique to assist it in its labors. In the last few years, excellent advocates have made their recommendations available in texts which are invaluable both to the busy trial lawyer and to the neophyte.

In this book, Mr. Belli, who is one of the nation's leading trial lawyers, has condensed much of the information appearing in his three-volume *Modern Trials* in a style which is of equal interest to the lawyer and to the layman. In addition to dealing with many of the practical problems of trial practice, it covers such delightful subjects as Canvasback Cohen, Minsky's Midsummer Follies, and May Colyer with her "Bald Headed Boys".

Mr. Belli is strongly imbued with the concept that there should be "no wrong without a remedy". In this, he is undoubtedly right. As a result, he attempts by this work to stimulate the resourcefulness of lawyers into discovering the remedy available, through an accurate analysis of the facts and the use of some imagination. Since many lawyers are office-sitters, Mr. Belli attempts to belabor them into more thorough investigations. It is true that lawsuits are won by witnesses rather than by the eloquence of attorneys and this is pointed out vividly again and again in this work.

Much of the book is spent in crusading against things of which the author particularly disapproves, and

his ideas make interesting reading. Some of these things are:

1. The conspiracy of silence among physicians, in malpractice cases;

2. The Warsaw Convention, limiting the maximum recovery from injuries received in international flights;

3. Ambulance chasing;

4. Delays in justice;

5. The scintilla contributory negligence rule;

6. The economic pressure compelling injured persons to settle worthy cases for minimum amounts.

Each of these is deserving of lengthy development. However, because of space limitations, let us go to the last subject for a moment. This is a real problem which society must face in caring for the injured in the delay period between injury and the payment of a judgment—which may take several years. Obviously attorneys should not shoulder this burden for several reasons: 1. It leads to bidding between ambulance chasers for the employment instead of cases going to counsel upon merit; 2. It leads to such chasers, strapped for funds while supporting such persons, "wholesaling" their cases and unloading them at far less than true value to get rid of the burden; 3. Counsel so deeply involved financially may resort to unethical practices upon trial to protect their investments.

Mr. Belli proposes that state funds be created from which advancements would be made, subject to repayment, to worthy persons and not leave them subject to the alternatives of succumbing to the blandishments of a shyster or to the financial club wielded by an insurance company. This is a real problem, it is a problem the Bar must face, and Mr. Belli's proposal is the most workable I have yet seen proposed. I strongly urge that this be studied and sponsored in a concrete form for reduction to legislation in the very near future.

It seems to be the common belief that Mr. Belli is desirous of seeing multi-figured verdicts in every case. This, he points out here, is not the situation. He deals harshly with those attorneys who demand unreasonable settlements for trivial injuries which result in the congestion of the courts with unwarranted litigation. An adequate award for substantial injuries is, of course, only proper, he argues; but no attorney should prostitute his talents to reward the malingerer. In fact, he strongly advocates compulsory physical examinations of all personal injury claimants to unmask the fraud and the malingerer.

He brings out strongly—and this should help the lay reader—the need for liability insurance adequate in amount and scope of coverage. Any man may be a defendant as well as a plaintiff, and he is foolish not to engage a professional, the insurance company, to fight his battles. He warns lay clients to tell their attorneys the truth in all cases, not to withhold or color the facts. These and other pointers are of value to those other than lawyers.

There are places, of course, where the ideas of this reviewer and Mr. Belli do not coincide. This would probably be true as to the ideas of any two trial lawyers dedicated to their work, and is particularly true where their backgrounds and types of practice are not identical. His ideas, however, are definitely educational; in addition, many of his philosophies deserve serious study in an effort to improve the administration of justice. The book is well written, it is stimulating and it possesses a wealth of information for the discriminating reader. It is worth purchasing.

JOHN ALAN APPLEMAN
Urbana, Illinois

READY FOR THE PLAINTIFF.

By Melvin M. Belli. New York: Henry Holt & Co. 1956. $6.50. Pages 311.

This literary offering has reader appeal. Readers, however, will vary in their appraisal of the book. The non-controversial parts merit considerable praise for they are exceptionally well done. For example, the nine pages of Chapter 2 could well be "must" reading for highway users if driving habits are to be improved with consequent reduction of traffic injuries and fatalities. Few will quarrel with the author's treatment of many of the landmark cases in tort law or with his scholarly explanation of twentieth century legislation such as the Federal Employers' Liability Act, the Workmen's Compensation Act, Jones Act, the Federal Tort Claims Act and others. His wide sweep of knowledge, clearly evidenced during his travel of the long road of personal injury litigation from investigation to appeal, commands respect.

Readers will differ in their appraisal of the author's main "sermon", however, for in its delivery he indulges in considerable literary license and, through repetition, may well have "overtried" his case against the Holy Grail Matterhorn Atomic Insurance Company, its claims personnel and its medical witnesses. The complaint, as would be expected by the author of *The Adequate Award,* is the "shortchanging of cripples" by means of "money holding", defined as the "unjust refusal to award an injured person the money that can be, at best, but a poor recompense for his pain, his suffering, or his permanent disablement". The standard by which to measure adequacy is nowhere defined and a $183,000 verdict is characterized as "not adequate to compensate for his loss, of course, but at least approaching the realistic". The single clue to the author's thinking is the statement: "Awards will never, I suppose, keep pace with the ever mounting profits realized by insurance companies. That is a utopian dream."

The latter statement suggests an entirely novel and revolutionary element in the measurement of damages. It also appears to be in direct conflict with the recently published reports that nearly all of the casualty companies sustained substantial losses last year and that the largest company on the Pacific Coast with

its main office in the author's home city, sustained an underwriting loss of twenty million dollars. It is likewise generally understood that insurance rates in San Francisco have been materially increased instead of remaining unaffected by large verdicts as stated by the author.

It seems curious that in stating the case for the personal injury lawyer for plaintiff the author should rely so heavily upon the weapon of criticism. He "lampoons" practically all members of the legal profession despite their areas of specialization. The "oh, so dignified probate lawyer" reading death notices, the bankruptcy lawyer with his "priority of payment" status, and the "senior-and-eighty-five-j u n i o r-partner law firm" from which "come most of the officers of bar associations" are but a few. Also he states, despite "countless scandals involving tax lawyers, public utility lawyers, [and] mortgage lawyers . . . these lawyers are always very numerous on the disciplinary committees of bar associations that sit in judgment upon some personal injury lawyer, their favorite scapegoat."

The criticism of some courts is even more severe and many will resent reading "the Supreme Court of Missouri is notorious for substituting its appellate discretion for that of its citizens who sit as jurors in the trial courts" and that the Pennsylvania Supreme Court is "one of the most *backward supreme courts* in America". Is criticism of still other courts to be implied from the carefully worded laudatory comment that "the Supreme Court of Massachusetts is one of the more 'learned' and 'respectable' appellate courts"?

Are the Canons of Professional Ethics spared from attack? Not so. Noting "the American Bar Association advises me through its 'canon of ethics' that I cannot loan this girl [client] one cent", the *coup de grâce* is thus given: "Some bar associations, the officers of which, themselves, eat regularly and sleep soundly, and do not represent plaintiffs, have pontificated that such practices of 'advances' are 'unethical,' even though generous and practically and legally necessary." Reference is also made of the author having been castigated for offering "some constructive criticism of the more unfortunately conceived canons of the ABA".

The law-trained readers fortunately are capable of making their own evaluation of this book on a chapter by chapter basis. They will not overlook the author's reference to his three-volume *Modern Trials* and his statement: "I wrote this book in two years, and in those two years I averaged two hours' sleep on week nights—one on week ends!" Come now, Mr. Belli, isn't this a bit of overstatement in your "Opening Statement"?

Certainly after reading the two interesting chapters on malpractice litigation and being told of the great increase in the number of such claims, the lawyer will decide for himself whether there is a "conspiracy of silence" which prevents the plaintiff from securing competent medical witnesses and whether malpractice insurers have ever threatened to cancel the insurance of otherwise willing doctors. As a reader of bar journals, he will make up his own mind whether "bar association journals are too busy pointing up the problems in embalming law or international law or in municipal bond law" to devote attention to personal injury problems. He will perhaps note that while remittitur and reversal are stressed, additur is almost completely ignored as is the fact, which the defendant cannot in most states tell the jury, that the plaintiff's award is not subject to the federal income tax. Indeed, the lawyer will find much to question. However, a rich reward of background information, helpful trial hints and investigative techniques will be the prize of the careful reader.

Apart from his statements "in this day and age, obviously, we cannot get along *without* our friendly protectors, the insurance companies" and that the liability insurance business is "an essential business, a social and economic necessity", the author resorts to use of the mailed fist in his attack on their methods. They vie with one another for the "privilege of betting", you "place your bet" by premium payment, and their educational literature on accident prevention, safe driving and the like is "a rigging of the odds in favor of the 'house' ". Among other things, "insurance companies love mistrials". A description of the insurance company doctor is: "He's usually gray-haired, well-fed, dignified, impeccably attired, and most ingratiating of manner. Of course there is no reason why he shouldn't be gracious and well-fed. He's getting anywhere from $150 to $500 a day for his appearance in court." The usual testimony of these doctors is that plaintiff will "recover as if by magic" as soon as the verdict is in, referred to by the author as the "gold cure" therapy. Understandingly enough, he fails to comment upon the countless injustices perpetrated against the insurance industry through the highly questionable or unscrupulous tactics of personal injury lawyers and equally impeccably attired doctors.

Lawyers, doctors and insurance men luckily are capable of judging the accuracy of most of the author's statements, opinions and conclusions relating to them and even if they actually do not enjoy reading this book, it will do them no permanent harm. What will be its impact on the average reader? Will his respect for law, the organized Bar and the administration of civil justice in our courts be increased? Or will a disservice have been done an already claims conscious public by giving them exaggerated ideas as to the worth of their claims?

Tort lawyers certainly will be mystified to read that the author was allowed to dramatize the agility of his client "Little Mo" before her accident with movies of her carrying the banner of the great U.S.A. on the Courts of Wimbledon. This is a tribute to his powers of imagi-

nation, persuasion and adroitness. Concededly it would never occur to a defense lawyer as possible or proper to demonstrate a lack of a plaintiff's agility before his injury with pictures showing him limping badly through the prison yard at Alcatraz.

It is a valid assumption that no busy defense lawyer will be willing to sleep only two hours a night to discuss his experiences with personal injury lawyers, to defend his brethren or the insurance industry. Happily, the defense Bar and the industry need no defense.

LEWIS C. RYAN

Syracuse, New York

A REPORT ON WORLD POPULATION MIGRATIONS: *As Related to the United States of America. Washington, D. C.: The George Washington University. 1956. Pages v, 449.*

This very useful book is an exploratory study of the relation between migration and American immigration policy by a staff of the George Washington University. The study is divided into four parts, the titles of which sufficiently indicate their drift. The first three are "The Economic Effects of Migration", "Needed Research in the Demographic and Sociological Aspects of Immigration", and "Problems and Prospects in the History of American Immigration". Following these three studies is a bibliography of over 300 pages. The bibliography is divided into the literature on the history of American immigration and literature dealing with the demographic, economic and sociological aspects of immigration.

This report is basically a prospectus for further study. In the economic section, for example, there is a detailed analysis in terms of current economic concepts of the questions which must be answered to determine the economic effects of migrations. What, for example, is the effect of immigration on the price level, wages and the formation of capital? And what are the effects of emigration on the country left behind? Might it, for example, be more to the interests of both countries for the populations to remain in place and the richer and less populated country to send capital to the overpopulated one? Might it not be that such a solution would make the maximum economic contribution to both with the least social disturbance? Literally dozens of such questions in the field of economics, sociology and history are posed as appropriate and useful to be explored. And the mere analysis of the subject leading to the posing of these questions contributes considerably to an understanding of it.

The purported motivation, however, of this report is somewhat confusing and I am afraid a little misleading. If taken at face value it is likely to arouse hopes which are doomed to disappointment. It is suggested in the preface that analysis of these issues has been undertaken in an atmosphere clouded "by the smog of self-interest or political pressures". This is surely true and a disinterested study is a legitimate objective. But when it is suggested that the answers to the questions here asked will have "direct application to the question of immigration" one is likely to remain quite unconvinced. This is so both because of the nature of the questions which the Report regards as significant, and the nature of the political problem of immigration. Note, for example, the following statement from the Report:

> The determination of optimum population in terms of developed and potential resources of a nation and the optimum distribution of population within the nation is a prerequisite of national population and migration policy.

Is it not fairly obvious that such a determination, given the limitations of our information, our analytic tools, and even more, of the enormously debatable questions involved in the notion of optima, cannot in the immediate future be made with that degree of precision which would command popular support. If such a determination is a prerequisite of national population and migration policy, it is evident that we could never have any policy on that subject. Indeed, the whole impact of the extremely able analysis of economic effects is that the subject put in these terms is hopelessly complex and intractible. This is more or less granted at the beginning of the discussion.

> Perhaps the major block to theorizing in a useful way on the economic effects of migration is that, whatever the effects of migration may be, they are likely to be the result of a large number of interrelationships.

It seems to me idle to hope or affirm that immigration policy will be seriously influenced by or responsive to the presumed answers to questions such as these. There are certain well-known facts which for the ordinary citizen and legislator are having an overwhelming impact in bringing policy choices within very narrow limits. These are the highly mature development of our land and mineral resources as compared with the days of unlimited immigration, the tremendous increase in the rate of growth of our own population and the staggering increases in population in the rest of the world. No one, as far as I know, has seriously proposed an annual regular immigration figure in excess of 250,000, plus such additions as may be dictated for the accommodation of political refugees. Indeed, this seems to be all but admitted in the Report.

> Limited emigration to solve specific problems has a place in the modern world but it cannot bring permanent relief to nations suffering from overpopulation. Since emigration is not a cure but a palliative, some other means of adjusting population to resources must be found.

There are many things wrong with our immigration law, particularly in its treatment of the individual both when he comes to this country and once he is here. But the kind of questions asked in this Report have very little relation to the solution of those problems. But I would concede that on one subject which is within the realm of practical politics research along the suggested lines may be relevant. The present distribution of the over-all

quota is geared to the theory that certain races are more assimilable than others. There is already a considerable body of literature for and against this thesis and I am sure that further work may be done on it. The upshot of the work to date is inconclusive, and this is in itself probably enough to suggest that a policy based on the racial theory is unacceptable. But for my part, I do not think that the answer to this question should be thought to depend on the rather uncertain and debatable answers which research will yield. I would suggest, indeed, that even if a reasonable man might decide that there is something to the racial theory (and I don't see how that possibility can be excluded) that theory should nevertheless not be a determinate of action. Let us remember that it is no longer a question of a million a year of this or that supposed class of undesirable immigrant. The whole total is not to be more than 250,000 per year, and whatever scheme is used will distribute the number over the whole spectrum of the human race. It is hard to believe that a few hundred or a thousand more of this or that kind can make much difference to a population of 170,000,000. And where the effects are so marginal it seems hardly worth while to arouse the displeasure of our international neighbors by pursuing invidious racial theories. Indeed, in important respects the racial theory is already breaking down. Under the displaced person and refugee relief statutes we have admitted eastern and southern European peoples much in excess of the regular quota. In any case, racial diversity has become so pervasive a characteristic of our political and economic life that there is no longer very much resistance to a reformation at least of the European quotas. The attitude, it is true, toward the orientals still remains hostile as it has been in the past.

It is not my purpose by these comments to question the basic value of this Report. It does propose for study subjects which are well worth the efforts of scholars. And even as it stands it provides an excellent analytic frame for thinking about population and immigration problems. It is, therefore, a very useful addition to the literature.

LOUIS L. JAFFE

Harvard University
Camridge, Massachusetts

BRANDEIS: A FREE MAN'S LIFE. *By Alpheus Thomas Mason. New York: The Viking Press. 1956. $7.50. Pages 713.*

It might be possible to do justice to Mr. Mason's book in a short review, but no short review could do justice to Brandeis. Perhaps all might be said in this: Be sure you have read this book before you die.

Brandeis from any standpoint was undoubtedly material for a good book; nevertheless, Mr. Mason has indeed done a good job of presenting Brandeis' life.

This volume is only incidentally a lawyer's book. It is what Mr. Mason says it is: an account of the life of a truly free man, of a man who so planned his life as not to be vulnerable economically, his professional hours so as not to be a work slave, his leisure hours so as not to be hurried, his social hours so as not to make himself victim of fools and bores. And he did all this without becoming a prig. He was too flexible and too wise to confuse the means with his desired end.

Mr. Mason shows first, briefly, the ancestry of Brandeis, and his youthful days; then presents him as a young lawyer in Boston; later, a seasoned and outstanding practitioner.

Brandeis' first sally as the people's attorney in the Boston traction case revealed the firmness, in the New England of that time, of the wedding between the possession of money and the possession of respectability.

Brandeis struggled for political reform, for industrial justice, for safer and cheaper and more nearly honest life insurance; he fought against the corrupt and goldbrick financing methods of the New Haven Railroad.

Then after many such cases, Brandeis took the national stage, from which he pointed out the danger of concentrated business and the petrifaction of the legal views of the Supreme Court. He emphasized that the traditional view of the Court had always been to presume the constitutionality of a legislative act and he pointed out that the Court had changed its position to cast on a state the burden of proving constitutional its legislative acts.

The Ballinger-Pinchot controversy followed, after which Brandeis struggled to bring industrial democracy into the garment trades. Following that he attempted to educate the railroads in methods of scientific efficiency; he battled against the money trust, against political reaction. Finally he came to the Supreme Court, where he strove to educate the courts and the lawyers to bring written law in accord with the facts of life. Those were the famous days of "Brandeis and Holmes (sometimes) dissent".

In whatever activity Brandeis engaged, his moderation, his democratic thinking and his innate distrust of concentrated power stand out as his guiding traits of character.

There is everything in the life of Brandeis to show that he hated the sin but almost nothing to show that he ever hated the sinner. His very moderation led him to be many times accused, and with apparent justification, of inconsistency. No one seemed to recognize that he was interested only in final results; he had an interest in the machinery used to obtain such results only so long as it was necessary in order to secure the result. It is impossible to conceive of Brandeis as a fanatic.

He himself said: "Fanatics should be sacrificed when the end is accomplished—like animals which had borne the gods to sacrificial feasts." Perhaps, as he pointed out, there is no more pathetic and tiresome a figure than the fanatic who, after years of struggle, has finally triumphed. The means used for his victory have absorbed his life, and he has nothing left to talk about.

The second thing that is indicative of the mind of the superior lawyer is Brandeis' insistence on learning all the background of his whole case, all the facts which were at all relevant to the main question. For he recognized fully what every superior lawyer knows: that there is never a lawsuit which simply questions the established rules; that only fools or knaves file such lawsuits; that the question almost always is not simply what the general rule says but in what way such general rule applies to the particular facts; that almost always the important case is an alleged exception to the general rule.

He never proceeded as does the more empirical lawyer: by getting a few cases in point in an attempt thus to win his lawsuit. He was a lawyer of imagination: sat and pondered what the law should be. If the law were not so, he probed for the reason that it was not, for the reason it did not square with common sense and with what his own eyes clearly saw.

The very core of Brandeis' life (again typical of the lawyer) was his innate distrust and dread of any and all concentrated power. It is incredible, as we look back, to see that the capitalists and industrialists of the early part of our century seemed actually determined to bring about socialism, determined to rush like swine into the sea. And they seemed incapable of understanding that Brandeis' war was not with them but with the excessive and arbitrary power which these people had and used and abused.

Brandeis passionately believed, indeed, in the necessity of preparing for change, which is the law of life, as stultification, ossification, are the laws of death. Hence he advocated strongly what he called the "right to experiment". Yet even concerning this closely held tenet he could speak with moderation, with a word of warning: "Some people assert that our present plight is due, in part, to the limitations set by the courts upon experimentation in the fields of social and economic science. . . . There must be power in the states and the nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs. . . . To stay experimentation in things social and economic is a grave responsibility. This Court has the power to prevent experimentation. . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles."

PHIL STONE

Oxford, Mississippi

MAN OF HIGH FIDELITY: EDWIN HOWARD ARMSTRONG. *By Lawrence Lessing. Philadelphia and New York: J. B. Lippincott Company. 1956. $5.00. Pages 320.*

This book is not by a lawyer nor about a lawyer, but it is intertwined with the history of some of the most famous patent litigation of recent decades. The author, a writer on science and technical subjects, formerly with *Fortune Magazine* and the *Scientific American,* here tells the fabulous story of the boy inventor who ended his days tragically in 1954 by suicide in New York City after a life of turbulent litigation and one spent in experiment and invention in the radio field.

Edwin Armstrong was born in New York City, educated at Yonkers High School and Columbia University, School of Engineering. It was there, while still in his teens, that he showed his earliest inventive genius. He was associated with the School of Engineering throughout the rest of his life.

There are four principal inventions connected with his name: in 1912 the regenerative or feedback circuit, in 1918 superheterodyne circuit, in 1923 an invention of the superregeneration which has not yet demonstrated its full utility, and finally in 1933 the famous FM radio or wide-band frequency modulation.

For nearly half of his sixty-four years, Armstrong was engaged in litigation, principally in defense of his patent claims. Lee deForest was his chief adversary through the years. The final decision of the United States Supreme Court was against Armstrong, and it is quite a bit of a biographer's zeal for the author to conclude "In twelve separate decisions made on the regenerative invention, excluding the final Supreme Court opinion (why this should be cavalierly excluded does not appear) . . . six tribunals decided in favor of Armstrong and six in favor of deForest, so there was at least a division of opinion even on the legal level though Armstrong lost the final decision".

The subject had a notable war record. He was a major in World War I in the Signal Corps and was awarded the United States Medal for Merit in World War II for his adaptation of FM to war service.

Armstrong ended his days in the midst of litigation against RCA and NBC. The strain had its effect upon him and in February, 1954, "completely and neatly dressed in hat, overcoat, scarf and gloves" he went, not out of the door, but out of the window, thirteen stories above the street. The last legal battle was subsequently settled with his estate for $1,000,000.

LESTER E. DENONN

New York, New York

Review of Recent Supreme Court Decisions

George Rossman

EDITOR-in-CHARGE

Aliens . . .
deportation

Rabang v. *Boyd,* 353 U. S. 427, 1 L. ed. 2d , 77 S. Ct. 985, 25 U. S. Law Week 4319. (No. 403, decided May 27, 1957.) *On writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Affirmed.*

This case dealt with the deportability of a Filipino, born in the Philippines in 1910, who has lived in the United States since 1930. In 1951, he was convicted upon a plea of guilty of violation of the federal narcotics laws. The Government sought to deport him under the Act of February 18, 1931, which provides for the deportation of "any alien" convicted of violating a federal narcotics law. He contended that, as a national of the United States by birth and at the time he entered the continental United States for permanent residence, his status was so close to that of native-born American citizenship that he should be divested of it only upon explicit declaration of congressional intention. The District Court denied a writ of heabeas corpus and declaratory relief from the deportation order, and the Court of Appeals affirmed.

Mr. Justice BRENNAN, speaking for the Supreme Court, affirmed. The Court reasoned that, while Filipinos were, after 1902, United States nationals and as such owed a permanent allegiance to this country, under the proclamation of Philippine independence on July 4, 1946, persons born in the Islands became aliens on that date. The Court distinguished *Barber* v. *Gonzales,* 347 U. S. 637, which held that a Filipino was not deportable as an alien convicted of crimes "committed . . . after entry", on the theory that as a United States national he had not made an *entry* in the statutory sense. But the 1931 Act was different from the 1917 Act because it was silent as to whether "entry" from a foreign country is a condition of deportability, the Court declared. The Court refused to hold that the requirement of "entry" was implicit in the 1931 Act.

Mr. Justice DOUGLAS wrote a dissenting opinion which urged, in spite of the literal language, that the 1931 Act was applicable only to aliens that had made an "entry" into this country.

The case was argued by John Caughlan for petitioner and by J. F. Bishop for respondent.

Aliens . . .
deportation

Lehmann v. *United States,* 353 U. S. 685, 1 L. ed. —, 77 S. Ct. 1022, 25 U. S Law Week 4341. (No. 72, decided June 3, 1957.) *On writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Reversed.*

Respondent, a native of Italy, entered the United States as a stowaway in 1919. No action was taken to deport him "within five years after entry" the limitation for deportation under the then-existing law, Section 19 of the Immigration Act of 1917. In 1936, respondent was convicted of blackmail in Ohio and sentenced to prison. A second sentence was to begin at the expiration of the first. In 1941, a proceeding to deport him was begun under the 1917 Immigration Act because of his criminal convictions, but before the final determination of that proceeding, the Governor of Ohio granted him a conditional pardon and the deportation proceeding was withdrawn. In 1952, Congress enacted the Immigration and Nationality Act which substantially changed the law. The present proceeding was brought under that act to deport respondent (1) as an alien who, at the time of entry was excludable by law and (2) as an alien who had been convicted of two crimes involving moral turpitude for neither of which "a full and unconditional pardon had been granted".

Respondent filed this petition for a writ of habeas corpus, which the District Court denied. The Court of Appeals reversed, holding that he had acquired a "status of nondeportability" under the prior law which was protected by the savings clause of the 1952 Act.

Mr. Justice WHITTAKER, speaking for the Court, reversed. The Court read the language of the 1952 savings clause ("Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed . . . to affect any prosecution . . . or any status . . . done or existing at the time this Act shall take effect. . . ."), and found that it did not help the alien here. The Court pointed to the phrase "unless otherwise specifically provided therein" and said that Section 241 of the 1952 Act did otherwise specifically provide when it made deportable any alien who "at the time of entry was within one or more of the classes of aliens excludable by law" and any alien who ". . . at any time after entry is convicted of two crimes involving moral turpitude . . ." The Court said that it seemed indisputable that Congress was legislating restrospectively to cover cases of this kind.

Mr. Justice BLACK, joined by Mr. Justice DOUGLAS, dissented, in this case and in No. 435, *infra,* arguing that such retroactive legislation was

Reviews in this issue by Rowland Young.

an *ex post facto* law. The dissent admitted that one line of cases upheld retroactive legislation with respect to aliens, but took the position that the Court should reconsider the *ex post facto* clause.

The case was argued by Roger D. Fisher for petitioner and by David Carliner for respondent.

Mulcahey v. *Catalanotte,* 353 U. S. 692, 1 L. ed. 2d —, 77 S. Ct. 1025, 25 U. S. Law Week 4342. (No. 435, decided June 3, 1957.) *On writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Reversed.*

This was a companion case to No. 72, *supra.* Respondent was an alien who entered the United States in 1920 for permanent residence. In 1925, he was convicted of a federal offense relating to illicit trade in narcotic drugs. At that time, there was no statute making that offense a ground for deportation. The Government sought to deport him in 1953 after passage of the Immigration and Nationality Act of 1952, which provides for the deportation of any alien ". . . who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs. . . ." The District Court denied a writ of habeas corpus, but the Court of Appeals reversed.

The Court's opinion, again written by Mr. Justice WHITTAKER, employed the same reasoning as in No. 72 in reversing the Court of Appeals. "It seems to us indisputable, therefore, that Congress was legislating retrospectively, as it may do, to cover offenses of the kind here involved" the Court repeated.

Antitrust law . . . "vertical" stock acquisitions

United States v. *E. I. du Pont de Nemours and Company,* 353 U. S. 586, 1 L. ed. 2d —, 77 S. Ct. 872, 25 U. S. Law Week 4343. (No. 3, decided June 3, 1957.) *On appeal from the United States District Court for the Northern District of Illinois. Reversed and remanded.*

In this decision of far-reaching consequences, the Court held that acquisition of the stock of a customer corporation as well as acquisition of the stock of a competing corporation may be violative of the antitrust laws. The decision, the first applying the antitrust laws to "vertical" acquisitions, contains a fascinating account of the relationship between two of the country's largest corporations, General Motors and du Pont, which owns 23 per cent of General Motors' stock. The fundamental issue in the case was whether du Pont's "commanding position" as General Motors' supplier of automotive fabrics and finishes was the result of competitive merit or the close intercompany relationship. The Government contended that du Pont had used its stock in General Motors "to channel General Motors' purchases to du Pont". The District Court had dismissed the Government's complaint.

The Court's opinion was delivered by Mr. Justice BRENNAN. The decision was based upon Section 7 of the Clayton Act, which makes it unlawful "to acquire, directly or indirectly, the whole or any part of the stock or share capital of another corporation . . . where the effect of such acquisition may be . . . to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce". The Court rejected the argument that the statute applied only to horizontal stock acquisitions, saying that the Federal Trade Commission's failure to apply the statute to vertical acquisitions was not a binding administrative interpretation, since the legislative history of Section 7 and a number of federal court decisions indicated otherwise. The statute applies, the Court declared, "whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce".

To the argument that the total General Motors' market for fabrics and finishes was only a negligible percentage of the total market for these materials for all uses, the Court replied that automobile finishes and fabrics have "sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics to make them 'a line of commerce' within the meaning of the Clayton Act". General Motors accounts for upwards of two fifths of the total sales of the automotive vehicles in the country, the Court noted, and du Pont in recent years has supplied about two thirds of General Motors' finishes and between a third and a half of its fabrics. Because of General Motors' size, this means that du Pont supplies approximately half of the relevant market for automotive finishes and fabrics, the Court said.

The appellees also contended that Section 7 is applicable only to the acquisition of stock and not to its holding or subsequent use. Not so, said the Court. "Its aim was primarily to arrest apprehended consequences of inter-corporate relationships before those relationships could work their evil, which may be at or any time after the acquisition. . . ." The fact that du Pont had acquired its General Motors' stock thirty years ago made no difference, the Court concluded, because the "plain language of §7" contemplates an action whenever the stock is used to lessen competition.

The Court then reviewed the history of the relationship between du Pont and General Motors from the time of du Pont's original purchase of GM stock in 1917. "The fact that sticks out. . . ." the Court said in summary, "is that the bulk of du Pont's production has always supplied the largest part of the requirements of the one customer in the automobile industry connected to du Pont by a stock interest. The inference is overwhelming that du Pont's commanding position was promoted by its stock interest and was not gained solely on competitive merit."

Mr. Justice CLARK, Mr. Justice HARLAN and Mr. Justice WHITTAKER took no part in the consideration

or decision of the case.

Mr. Justice BURTON wrote a dissenting opinion in which Mr. Justice FRANKFURTER joined. The dissent took a much different view of the law and of the facts. It disagreed that Section 7 applies to vertical stock acquisitions, saying that legislative history, administrative practice and judicial interpretation all pointed to the contrary. Moreover, the dissent argued, the language and structure of Section 7 show that the effect of the stock acquisition on competition was to be determined at the time of the acquisition, not the time the Government chose to bring its suit. Here thirty years had elapsed since du Pont acquired the GM stock. The Clayton Act was intended to check anti-competitive practices in their incipiency, the dissent declared. Furthermore, it was said that the Court had overturned some of the basic findings of fact of the District Court. As the dissent viewed the record, du Pont products were used on a large scale for many other purposes in many other industries, and neither the automobile industry nor General Motors comprised a substantial share of the market. Furthermore, it argued that the Government had failed to prove that du Pont's competitors had been foreclosed from a substantial portion of the relevant market.

The case was argued by John F. Davis for appellant and by Robert L. Stern and Hugh B. Cox for the appellees.

Armed Forces . . . *sentences*

Jackson v. *Taylor*, 353 U.S. 569, 1 L. ed. 2d —, 77 S. Ct. 1027, 25 U.S. Law Week 4374. (No. 619, decided June 3, 1957.) *On writ of certiorari to the United States Court of Appeals for the Third Circuit. Affirmed.*

Petitioner was convicted by an Army court martial of the separate offenses of murder and attempted rape. He was given an aggregate, or "gross" sentence of life for both offenses. The Army board of review found the conviction of murder "incorrect in law and fact", but approved the guilty finding for attempted rape. It found also that "only so much of the approved sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years is correct in law and fact". He began this action for habeas corpus, arguing that, since life was the minimum sentence for murder, the sentence of the court martial was for murder and it had not imposed any sentence for the crime of attempted rape. A board of review, the petitioner's argument contended, has no power to impose an original sentence, and so its reservation of twenty years of the life sentence was null and void. The District Court denied the writ and the Court of Appeals affirmed.

The Supreme Court affirmed in a five-to-four decision, Mr. Justice CLARK delivering the opinion of the Court. The Court took the position that it would have done no possible good for the law officer at the court martial to instruct the court on the attempted rape charge when by law it was required to impose a sentence of death or life imprisonment for the murder charge. The life sentence covered both crimes, the Court declared, since military law requires that only one sentence be imposed. The Court examined the legislative history of the Uniform Code of Military Justice and concluded that the board of review exercised exactly the kind of authority that Congress intended. As for the argument that the court martial might have imposed a lighter sentence for attempted rape, had it considered the matter, the Court said that this was an objection that might properly be addressed to the Congress. It also ruled that there was no authority in the Code for petitioner's suggestion that the board of review should have remanded for a rehearing before the court martial on the question of the sentence. The very nature of a court martial made such a proceeding impractical and unfeasible, the Court declared.

Mr. Justice BRENNAN wrote a dissenting opinion in which the CHIEF JUSTICE, Mr. Justice BLACK and Mr. Justice DOUGLAS joined. The dissent saw the action of the board of review as an original imposition of sentence for the crime of attempted rape. It quoted with approval Judge Major's opinion in the similar case of *De Coste* v. *Madigan*, 223 F. 2d 906 (7th Cir. 1955), which concluded with the words "Imposition of sentence by the proper authority is an essential step in administration of criminal justice. Here, under the statute, only the court-martial was authorized to take this step; it failed to do so."

The case was argued by Urban P. Van Susteren for petitioner and by Ralph Spritzer for respondents.

Fowler v. *Wilkinson*, 353 U.S. 583, 1 L. ed. 2d —, 77 S. Ct. 1035, 25 U.S. Law Week 4377. (No. 620, decided June 3, 1957.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Affirmed.*

This was a companion case to No. 619, *supra*, and involved the same crime.

Mr. Justice CLARK, again speaking for the Court, noted that here the petitioner also contended that the twenty-year sentence was arbitrarily severe, citing *United States* v. *Voorhees*, 4 U.S.C.M.A. 509 (1954). The Court replied, however, that it exercised "no supervisory power over the courts which enforce [military] law. . . . If there is injustice in the sentence imposed it is for the Executive to correct, for since the board of review has authority to act, we have no jurisdiction to interfere with the exercise of its discretion. That power is placed by the Congress in the hands of those entrusted with the administration of military justice. . . ."

The Court also dismissed an argument that the adjustment of the sentence by the board deprived the petitioner of two appeals, since, if the attempted rape sentence had been imposed by a court martial, it would have been reviewed first by

the convening authority. The Court answered that Congress did not intend any such result. It affirmed for these reasons and for those given in *Jackson* v. *Taylor, supra.*

The CHIEF JUSTICE, Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice BRENNAN dissented for the reasons stated in the dissenting opinion in No. 619.

The case was argued by Leon S. Epstein for petitioner and by Ralph Spritzer for the respondent.

Constitutional law . . . *court-martial of civilians*

Reid v. *Covert, Kinsella* v. *Krueger* 354 U.S. —, 1 L. ed. 2d 1148, 77 S. Ct. 1222, 25 U.S. Law Week 4444. (Nos. 701 and 713, decided June 10, 1957.) *On rehearing. Judgment in No. 701, Reid* v. *Covert, affirmed. Judgment in No. 713, Kinsella* v. *Krueger, reversed and remanded.*

In one of the most significant constitutional law decisions of the October, 1956, term, the Supreme Court reversed its 364-day-old holding in these cases, now ruling that civilian dependents of American military personnel stationed abroad are not subject to trial by court martial. The Court held unconstitutional Article 2(11) of the Uniform Code of Military Justice. Mr. Justice BRENNAN and Mr. Justice HARLAN sided with the dissenters from last year's decision in the present rehearing. The cases involved two servicemen's wives court-martialed for murdering their husbands.

Mr. Justice BLACK announced the decision of the Court in an opinion in which the CHIEF JUSTICE, Mr. Justice DOUGLAS and Mr. Justice BRENNAN joined. The relevant constitutional provisions are Article III, Section 2 ("The Trial of all Crimes . . . shall be by Jury . . . and shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed") and the Fifth and Sixth Amendments. The opinion rejects the idea that "when the United States acts against citizens abroad it can do so free of the Bill of Rights". Last year's holding that these constitutional provisions did not apply abroad rested on *In re Ross,* 140 U.S. 453, dealing with a trial by an American consular court in Japan. The opinion characterizes the *Ross* case as "one of those cases that cannot be understood except in its peculiar setting; even then, it seems highly unlikely that a similiar result would be reached today". The Insular Cases were distinguished on the ground that they had nothing to do with military jurisdiction over civilians.

The Government had contended that Section 2(11) of the Uniform Code could be sustained as legislation "necessary and proper" to carry out the United States' obligations under the Status of Forces Agreement with Great Britain and a similar agreement with Japan. The opinion replied that "The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of government, which is free from the restraints of the Constitution", adding that nothing in the language of the supremacy clause (Article VI) or of *Missouri* v. *Holland,* was to the contrary.

The opinion then discussed the power of Congress "To make Rules for the Government and Regulation of the land and naval Forces", saying that the "natural meaning" of those words did not extend the power to civilians, even civilians living on military bases. The opinion canvassed the historical background of Article I, Section 8, Clause 14 to show that it was not intended to permit the trial of civilians in military courts.

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

Mr. Justice FRANKFURTER wrote an opinion concurring in the result. This opinion took the position that trial by court martial was constitutional "only for persons who can, on a fair appraisal, be regarded as falling within the authority given to Congress to . . . regulate the 'land and naval Forces' ". The problem could not be solved, the opinion argued by recourse to the literal words, but only by taking due account of all the relevant constitutional provisions. Since these were capital cases, "the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights", the opinion declared. After reviewing the Insular Cases and *In re Ross,* and distinguishing the situations with which Congress was dealing there and the present problem, the opinion concluded that those cases did not apply.

Mr. Justice HARLAN, who had voted with the majority in the decision last term, wrote an opinion concurring "on the narrow ground that where the offense is capital, Article 2(11) cannot constitutionally be applied to the trial of civilian dependents of members of the armed forces overseas in times of peace". Explaining his change of mind, Mr. Justice HARLAN said that he had concluded that the earlier holding was wrong in its premise that under the Constitution the mere absence of a prohibition against an asserted congressional power, plus the abstract reasonableness of its use, is enough to establish validity. Furthermore, he added, he thought that the Court was mistaken in interpreting *In re Ross* and the Insular Cases as standing for the "sweeping proposition" that constitutional safeguards have no application to the trial of American citizens outside the United States, no matter what the circumstances. Examining the Article I power of Congress, he takes the position that, while the court martial of civilian dependents was not an arbitrary extension of congressional power, the question is "*which* guarantees of the Constitution *should* apply in the particular circumstances . . ." he would limit the present holding to capital cases, without deciding the exact limits of congressional power to provide for court martial of citizens abroad.

Mr. Justice CLARK who wrote the 1956 opinion of the Court, wrote a dissenting opinion in which Mr. Justice BURTON joined. The dissent took the position that historically the military has always exercised jurisdiction over civilians accompanying armies in time of war and argued that in fact the dependents of servicemen are part of the military community abroad. The only practical alternative to court martial, the dissent said, in many cases will be trial of the dependents in foreign courts, "an unhappy prospect not only for them but for all of us".

The case was argued by Solicitor General J. Lee Rankin for the United States and by Frederick Bernays Wiener for the accused.

Constitutional law . . . *self-incrimination*

Curcio v. *United States*, 354 U. S. —, 1 L. ed. 2d 1225, 77 S. Ct. 1145, 25 U.S. Law Week 4433. (No. 260, decided June 10, 1957.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Reversed and remanded.*

In this decision, the Court upheld the refusal of an officer of a labor union to answer questions about the whereabouts of union books which he had failed to produce in response to a subpoena.

In 1956, a grand jury was investigating charges of racketeering in the garment and trucking industries of New York City. Curcio, the secretary-treasurer of one of the locals under investigation, was served with a subpoena *ad testificandum* and a subpoena *duces tecum* for the union's records. He appeared, but without the records. He testified that he was the secretary-treasurer of the union, that it had books and records, but that they were not in his possession. He refused on the ground of self-incrimination to answer any questions about the whereabouts of the records. He was adjudged guilty of criminal contempt and sentenced to six months, the conviction relating solely to his failure to answer questions pursuant to the subpoena *ad testificandum*, since he was not charged with failing to produce the books and records demanded in the subpoena *duces tecum*. The Court of Appeals affirmed the conviction.

The unanimous opinion of the Supreme Court reversed and remanded, the Court's opinion being delivered by Mr. Justice BURTON. The Court drew a distinction between this case and the case of the corporation officer who is the custodian of corporate books or records. Such a custodian, the Court said, was not protected by the constitutional privilege against self-incrimination, but here the Government sought to compel the petitioner to disclose, by his oral testimony, the whereabouts of books and records that he has failed to produce, and sought to make him name the persons who had possession of the missing files, even though to do so might incriminate him. "Answers to such questions are more than 'auxiliary to the production' of unprivileged corporate or association records" the Court declared.

The case was argued by Samuel Mezansky for petitioner and by Beatrice Rosenberg for the respondent.

Criminal law . . . *conspiracy*

Grunewald v. *United States, Halperin* v. *United States, Bolich* v. *United States*, 353 U.S. 391, 1 L. ed. 2d 931, 77 S. Ct. 963, 25 U.S. Law Week 4322. (Nos. 183, 184 and 186, decided May 27, 1957.) *On writs of certiorari to the United States Court of Appeals for the Second Circuit. Reversed and remanded.*

These cases dealt with an alleged conspiracy among the petitioners and others to defraud the United States by "fixing" tax fraud cases with the use of bribes and improper influence. The Supreme Court's opinion resolved two aspects of the case, one dealing with the statute of limitations, the other with the use on cross-examination of petitioner Halperin's prior claim of the privilege against self-incrmination while he was testifying before the grand jury. The Court of Appeals had affirmed the convictions, one judge dissenting. The Supreme Court reversed and remanded.

Mr. Justice HARLAN, speaking for the Supreme Court, first took up the question of the statute of limitations. The Bureau of Internal Revenue rulings obtained by the conspirators were handed down in 1948 and 1949, while the grand jury's indictment was not returned until October 25, 1954, when the three-year statute had run according to the argument of the petitioners. The Government had two counters to this argument, one of which the Court rejected, the other as to which it ordered a new trial.

The Government first argued that the conspiracy to fix tax evasion cases included as a subsidiary element a further agreement to conceal the conspiracy, and, so the Government contended, this subsidiary agreement clearly continued long after the main purpose of the conspiracy was accomplished. The Court rejected this theory on the strength of *Krulewitch* v. *United States*, 336 U.S. 440, and *Lutwak* v. *United States*, 344 U. S. 604. After reviewing the holdings in those cases, the Court said, "We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because the conspiracy is kept a secret and merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished". The Court said the Government's attempt to differentiate this case from *Krulewitch* and *Lutwak* was "one of words rather than of substance".

The Government's second argument as to the statute of limitations was that the conspiracy was not merely to obtain the initial "no prosecution" rulings from the Bureau in 1948 and 1949, but to obtain *final immunity* for the taxpayers. Such immunity could not have been obtained until 1952 when the statute of limitations had run

on the cases that the conspiracy had attempted to fix. The Supreme Court agreed with the Court of Appeals that this argument was a tenable one, but it ordered a new trial on the ground that the trial judge's charge had not adequately submitted this theory of the case to the jury. The charge left it open for the jury to convict, the Court reasoned, even though they found that the acts of concealment were motivated purely by the purpose of the conspirators to cover up their already accomplished crime.

The second issue in the case was use in cross examination of petitioner Halperin's invocation of the Fifth Amendment during the grand jury hearings. At the trial, Halperin answered the same questions put to him by the grand jury, and he answered them in a way consistent with innocence. He contended that he had invoked the privilege before the grand jury on advice of counsel that answers to the questions might furnish evidence against him. The District Court had relied on *Raffel* v. *United States,* 271 U. S. 494, in allowing the Government to cross examine as to this grand jury testimony, on the theory that such cross examination could be used to impugn credibility. The Supreme Court distinguished the *Raffel* case, holding that here witness's claim of the Fifth Amendment privilege before the grand jury was wholly consistent with innocence.

Mr. Justice BLACK, joined by the CHIEF JUSTICE, Mr. Justice DOUGLAS and Mr. Justice BRENNAN, wrote a concurring opinion expressing agreement with the Court except that the dissent urged that the *Raffel* case should have been overruled rather than distinguished.

The cases were argued by Edward J. Bennett for petitioner in No. 183, by Rudolph Stand for petitioner in No. 186, by Henry G. Singer for petitioner in No. 184, and by John F. Davis for respondent.

Criminal law . . . *F.B.I. files*

Jencks v. *United States,* 353 U. S. 657, 1 L. ed. 2d 1103, 77 S. Ct. 1007, 25 U. S. Law Week 4365. (No. 23, decided June 3, 1957.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Reversed.*

Underlying the decision here was the vexing problem of the Government's reluctance to make public confidential information important to national security in a criminal prosecution based on such information.

The prosecution was for filing an allegedly false non-Communist affidavit required by Section 9 (h) of the Taft-Hartley Act, the issue being whether Jencks, a union officer, swore falsely when he executed an affidavit on April 28, 1950, that he was not a member of the Communist Party. The Government's case rested on circumstantial evidence and consisted principally of the testimony of two former Communist Party members, Matusow and Ford, who were undercover agents of the F.B.I. Their testimony dealt with Jencks' conduct between 1946 and 1950 and indicated that the Party took no disciplinary action against him for defection or deviation and did not replace him in the Party office which Ford testified that Jencks held. Jencks moved for an order directing an inspection of the reports Ford and Matusow made to the F.B.I. concerning his Communist activities. The Government opposed the motion on the sole ground that a preliminary foundation was not laid to show inconsistency between the contents of the reports and the testimony of the witnesses at the trial. The Court of Appeals affirmed the conviction, "primarily upon that ground", to use the language of the Supreme Court.

The Court's opinion was delivered by Mr. Justice BRENNAN. In reversing, the Court declared that it was not necessary to show a conflict between the reports and the testimony. ". . . a sufficient foundation was established by the testimony of Matusow and Ford that their reports were of the events and activities related in their testimony" the Court said, noting that impeachment of the testimony of the two undercover agents was "singularly important" to Jencks. The Court went on to say, "The practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved." The Court pointed out that the Government had not asserted that the reports were privileged on the grounds of national security, confidential character, or public interest, adding, "We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial."

Mr. Justice FRANKFURTER joined the opinion of the Court but noted that in his view questions relating to the instructions to the jury, not reached by the Court, should be dealt with.

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

Mr. Justice BURTON, joined by Mr. Justice HARLAN, wrote an opinion concurring in the result. This opinion agreed that it was unnecessary to show a contradiction between the F.B.I. reports and the testimony of Matusow and Ford, but argued that the Court went too far in holding that the defendant was entitled to the reports. In this view, the reports should have been produced to the trial judge for determination whether they contained material of value to the defendant. This opinion also took the position that the trial judge's instructions had failed to give the jury sufficient guidance on the meaning of the phrases "member of the Communist Party" and "affiliated with such Party".

Mr. Justice CLARK wrote a dissenting opinion which argued that,

in saying that the criminal action must be dismissed when the Government elects not to comply with an order to produce its records for the inspection of the accused, the Court was creating a new rule of evidence under which Government intelligence agencies might as well close up shop, "for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets".

The case was argued by John T. McTernan for the petitioner and by John V. Lindsay for the respondent.

Criminal law . . . *accuracy of record*

Chessman v. *Teets*, 354 U. S. —, 1 L. ed. 2d 1253, 77 S. Ct. 1127, 25 U. S. Law Week 4420. (No. 893, decided June 10, 1957.) *On writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Judgment vacated and cause remanded.*

In this case, the convicted author of two best sellers written about his experiences was successful in his efforts to obtain a new record of his trial which had ended in conviction of a series of felonies. The official court reporter of the trial proceedings died about a month after the trial, leaving untranscribed 1164 pages of the 1810-page transcript. The transcription was completed by another reporter who later turned out to be an uncle by marriage of the deputy district attorney in charge of the case. The case has had protracted litigation over the nine-year period since Chessman's conviction. The present writ of certiorari was limited to the question whether he was deprived of due process by the proceedings settling the trial transcript. He alleged that he was not present during the proceedings and was not represented by counsel.

Speaking for the Supreme Court, Mr. Justice HARLAN vacated the judgments of the Court of Appeals and the District Court and remanded the cause to the District Court with instructions to enter orders appropriate to allow California a reasonable time to give Chessman "a further review of his conviction upon a properly settled record".

In arriving at its decision, the Court stressed the relationship of the substitute reporter and the deputy district attorney and the fact that the finished transcript had been prepared in close collaboration with the deputy district attorney and two police officers who testified for the state at the trial. The Court was careful to say that it was not holding that the record was inaccurate or incomplete. "All that we hold is that, consistent with procedural due process, California's affirmance of petitioner's conviction upon a seriously disputed record, whose accuracy petitioner has had no voice in determining, cannot be allowed to stand." The petitioner is entitled to his day in court on the controversial issues of fact and law involved in the settlement of the record, the Court declared.

The CHIEF JUSTICE took no part in the consideration or decision of the case.

Mr. Justice DOUGLAS, joined by Mr. Justice CLARK, dissented, taking the position that "in substance the requirements of due process have been fully satisfied". The dissent pointed out that while Chessman was not present in court when the record was settled, he had played an active role in the process and had gone over an early draft of the record "with a fine-tooth comb", submitting some 200 corrections of which about eighty were adopted. Many of Chessman's objections to the finished transcript, the dissent, argued, were general and indefinite, and none of them placed a finger on a crucial issue or showed that the final record distorted the evidence to his prejudice. "The conclusion is irresistible that Chessman is playing a game with the courts, stalling for time while the facts of the case grow cold" the dissent declared.

Mr. Justice BURTON dissented, noting that he believed that "upon consideration of all the circumstances of this case, the State of California has accorded to this petitioner due process of law within the meaning of the Constitution of the United States".

The case was argued by George T. Davis for Chessman and by William M. Bennett for the respondent.

Government Contracts . . . *Miller Act*

United States v. *Carter*, 353 U. S. 210, 1 L. ed. 2d 776, 77 S. Ct. 793, 25 U. S. Law Week 4263. (No. 48, decided April 29, 1957.) *On writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Reversed and remanded.*

The question here was the extent of the liability of the surety on a bond furnished by a contractor, as required by the Miller Act, for the protection of persons supplying labor for the construction of federal public buildings. The collective bargaining agreement under which the laborers were hired contained provisions for the payment of 7½ cents an hour to trustees of a health and welfare fund, the trustees to use the money to purchase various types of life, accident, hospitalization and surgical benefit insurance for the laborers. It was provided that the laborers had no rights to the benefits except as provided in the policies, and further that they had no right, title or interest in the contributions and that the contributions "shall not constitute or be deemed to be wages".

The contractor became insolvent after completing the construction work and paying the laborers their wages. He was unable to pay the contributions to the trustees, who brought this suit against the surety, who had issued the payment bond required by the Miller Act. The District Court granted the surety's motion for a summary judgment, and the Court of Appeals affirmed, holding that the trustees had no right to sue under Section 2 of the Act since they were neither persons that had furnished labor or material, nor were they seeking sums

"justly due" to such persons.

Mr. Justice BURTON delivered the opinion of the Supreme Court reversing and remanding. The Court reasoned that there would be no problem if the collective bargaining agreement had required the contractor to pay each employee 7½ cents more an hour and the employee had agreed to contribute that sum to the fund. The present situation was really no different, the Court said, since the 7½ cents an hour was part of the compensation that the contractor had agreed to pay for the services of the laborers. The Court pointed out that the Miller Act does not limit recovery on the statutory bond to "wages", and it made no difference that the contractor's obligation to the fund was not set forth in his contract with the Government, but only appeared in the labor agreements. The obligation to pay wages, concededly covered by the bond, also stemmed from the labor agreements, the Court said. As for the argument that the trustees were not persons that furnished labor or material nor were they seeking "sums justly due" to such persons, the Court said that the trustees' position was "closely analogous" to that of assignees of the claims of persons furnishing labor or materials.

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

The case was argued by Thomas E. Stanton, Jr., for petitioners and by Richard C. Dinkelspiel for respondents.

Labor law . . . *arbitration*

Textile Workers Union v. *Lincoln Mills of Alabama*, 353 U. S. 448, 1 L. ed 2d 972, 77 S. Ct. 912, 25 U.S. Law Week 4387. (No. 211, decided June 3, 1957.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Reversed.*

The question here was the power of a federal district court to compel arbitration pursuant to an arbitration provision in a collective bargaining agreement.

The controversey between the petitioner union and the employer involved several grievances concerning work loads and work assignments. The grievances were processed through the various steps according to the procedure outlined in the collective bargaining agreement. The last step in the agreement—one that could be invoked by either party—was arbitration. When it came to that step, however, the employer refused to arbitrate and the union brought this suit in the District Court to compel arbitration. The District Court ordered the employer to comply with the arbitration provisions of the agreement, but the Court of Appeals reversed by a divided vote, holding that, although the District Court had jurisdiction, it had no authority under either federal or state law to grant the relief requested.

Mr. Justice DOUGLAS delivered the opinion of the Supreme Court reversing. The Court was faced with two conflicting views of Section 301 (a) of the Labor Management Relations Act upon which the case turned. One view was that that Section merely gives federal district courts jurisdiction in controversies affecting commerce without diversity of citizenship and without regard to the amount in controversy. The other view, that adopted by the Court, was that the section authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements. In reaching its conclusion, the Court relied upon the legislative history of the section, determining that Congress intended to make collective bargaining agreements "equally binding and enforceable on both parties". The Court said that one of the purposes of the statute was to promote collective bargaining that ended in agreements not to strike. The Court pointed out that the chief advantage to an employer in agreeing to a collective bargaining contract was the assurance of uninterrupted operation during the term of the contract. In other words, as the Court viewed it, the agreement to arbitrate was the *quid pro quo* for the agreement not to strike, and the statute was an expression of federal policy that federal courts should enforce the agreements against either party to a collective bargaining agreement. Section 301 (a) the Court held, sets up substantive federal law "which the courts must fashion from the policy of our national labor laws", drawing from express statutory mandates and "judicial inventiveness". The Court also dismissed arguments that Section 301 (a) was not within the purview of judicial power under Article III of the Constitution and that the Norris-LaGuardia Act had withdrawn jurisdiction to compel arbitration of grievance disputes.

Mr. Justice BLACK took no part in the consideration or decision of the case.

Mr. Justice BURTON, joined by Mr. Justice HARLAN, wrote an opinion concurring in the result. This opinion took the view that the District Court's power to compel arbitration was found in Section 301 (a) itself, rejecting the notion that the substantive law to be applied under Section 301 (a) was federal law.

Mr. Justice FRANKFURTER wrote a dissenting opinion (see *infra*).

The case was argued by Arthur J. Goldberg for the petitioner and by Frank A. Constangy for respondent.

Goodall-Sanford, Inc. v. *United Textile Workers of America*, 353 U. S. 550, 1 L. ed. 2d 1031, 77 S. Ct. 920, 25 U. S. Law Week 4390. (No. 262, decided June 3, 1957.) *On writ of certiorari to the United States Court of Appeals for the First Circuit. Affirmed.*

This was a companion case to No. 211, *supra*, in which the union again sought specific performance of a grievance arbitration provision. The controversy was over layoff of employees incident to a curtailment of production and liquidation of plants. The District Court granted specific performance, and was affirmed by the Court of Appeals, again relying on the Arbitration Act.

Mr. Justice DOUGLAS affirmed for the Court, citing No. 211 as controlling.

The Court also faced a further question whether an order directing arbitration was appealable. It said that a line of cases holding unappealable orders directing arbitration under the Arbitration Act was inapplicable since the right enforced here arose under Section 301 (a) of the Labor Management Relations Act, not under the Arbitration Act.

Mr. Justice BURTON and Mr. Justice HARLAN concurred in the result for the reasons stated in Mr. Justice BURTON's opinion in No. 211.

Mr. Justice BLACK took no part in the consideration or decision of the case.

The case was argued by Douglas M. Orr for petitioner and by David E. Feller for respondents.

General Electric Company v. *Local 205, United Electrical, Radio and Machine Workers of America,* 353 U.S. 547, 1 L. ed. 2d 1028, 77 S. Ct. 921, 25 U.S. Law Week 4391. (No. 276, decided June 3, 1957.) *On writ of certiorari to the United States Court of Appeals for the First Circuit. Affirmed.*

This was a companion case to No. 211, *supra,* involving a collective bargaining agreement that provided a four-step procedure for settling grievances with the further provision that the grievances should be arbitrated if the four steps failed to settle the controversy.

The union filed written complaints dealing with higher pay for one employee and the alleged wrongful discharge of another. When the four-step process of adjustment had failed, the union asked for and was refused arbitration. This suit followed. The District Court dismissed the suit, holding that it was barred by the Norris-LaGuardia Act. The Court of Appeals reversed, basing its decision on the United States Arbitration Act which it held applicable.

The Supreme Court affirmed, again speaking through Mr. Justice DOUGLAS. The Court, however, rested its decision on the *Textile Workers* case rather than on the Arbitration Act.

Mr. Justice BURTON and Mr. Justice HARLAN concurred in the result for the reasons stated in Mr. Justice BURTON's opinion in No. 211.

Mr. Justice BLACK took no part in the consideration or decision of the case.

Textile Workers Union v. *Lincoln Mills of Alabama, General Electric Company* v. *Local 205, United Electrical, Radio and Machine Workers of America, Goodall-Sanford, Inc.* v. *United Textile Workers of America,* 353 U. S. —, 1 L. ed. 2d 983, 77 S. Ct. 923, 25 U. S. Law Week 4392. (Nos. 211, 262 and 276, decided June 3, 1957.)

Mr. Justice FRANKFURTER wrote a dissenting opinion in these three cases which took the position that the statute was exclusively procedural, merely affording a federal forum for suits on agreements between labor organizations and employers, but not enacting federal law for such suits. Otherwise, the dissent argued, serious constitutional problems arose because the scope of federal judicial power was limited by Article III of the Constitution. This opinion is quite long, and contains the entire relevant legislative history of the Case Bill and the Taft-Hartley Act as an appendix.

Railroads . . . *acquisitions*

Alleghany Corporation v. *Breswick and Company; Baker, Weeks and Company* v. *Breswick and Company; Interstate Commerce Commission* v. *Breswick and Company,* 353 U. S. 151, 1 L. ed. 2d 726, 77 S. Ct. 763, 25 U. S. Law Week 4251. (Nos. 36, 82 and 114, decided April 22, 1957.) *On appeals from the United States District Court for the Southern District of New York. Reversed and remanded.*

The basic question in these cases was whether the Alleghany Corporation, an investment company, was under the jurisdiction of the Interstate Commerce Commission, as a non-carrier "considered as a carrier" under the Interstate Commerce Act, or whether it was subject to the jurisdiction of the Securities and Exchange Commission under the Investment Company Act. The suit was filed by appellees, minority stockholders of Alleghany, to set aside orders of the Interstate Commerce Commission (hereafter called the Commission) and to enjoin issuance of a new class of Alleghany preferred stock. Numerous issues as to the powers and jurisdiction of the Commission, especially under Section 5 of the Interstate Commerce Act, were involved.

The facts were complicated. Summarized briefly, Alleghany had a controlling share of the stock of New York Central, which in turn owned most of the stock of four smaller railroads (the Big Four) and which operates the lines of the Big Four as lessee. The controversy arose when Alleghany, Central, and the Big Four applied to the Commission for permission to merge the Louisville and Jeffersonville Bridge Railroad, owned by the Big Four and operated under lease by New York Central, into the Big Four. Central was then to operate the combined properties under the Big Four lease. The Commission granted permission for the merger after hearings in which the S.E.C. intervened. Later, Alleghany and Central sought Commission permission to acquire control of three New England railroads operated by Central under leases and in which Central had some stock interest. The Commission approved this application and also Alleghany's application to issue new 6 per cent convertible preferred stock, which was the source of the controversy. The three-judge District Court set aside the Commission's order and enjoined issuance of the new stock.

Mr. Justice FRANKFURTER delivered the opinion of the Supreme Court on direct appeal. Holding that the appellees had standing to sue, a threshold issue, on the theory that the proposed stock issue threatened to dilute their equity in Alleghany, the Court then took up three questions that were determinative of the merits.

First, the Court considered the appellee's attack on the Commission's order conferring on Alleghany the status of a person "not a carrier but to be 'considered as a carrier' ". Section 5 (2) of the statute requires Commission approval "for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise". The Court said that if Alleghany in fact had control of the acquired carriers, failure to obtain the Commission's consent to the acquisition did not prevent it from acquiring the status of the "non-carrier considered as a carrier".

Another problem, the District Court's conclusion that Alleghany did not in fact have control, the Court answered by saying that the District Court took too restricted a view of what constitutes "control". The test for this was for the determination of the enforcing agency in a particular case, the Court declared, and here there was enough evidence upon which the Commission could base a holding that Alleghany did have actual control of Central.

A third problem, whether the Jeffersonville transaction involved acquisition of control of Alleghany over the Jeffersonville properties, the District Court had answered in the negative, ruling that if "the merger still leaves the non-carrier in indirect control of such property, no acquisition by the non-carrier results from the merger. . . ." But this was too narrow a reading, the Court said. The crux of the question whether there has been an "acquisition of control", is the nature of the change in relations between the companies involved. Here the proposal was to merge Jeffersonville into the Big Four, and, the Court reasoned, a merger is the ultimate in one company obtaining control of another. "In view of this it cannot reasonably be said that there has been no increase in the power of the Big Four, Central, and, through its relation with them, Alleghany, over Jeffersonville." In view of these considerations, the Court ruled that Alleghany had sufficient "control" over operating lines to bring it under the Commission.

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

Mr. Justice DOUGLAS wrote a dissenting opinion in which the CHIEF JUSTICE and Mr. Justice BLACK concurred. The dissent argued that Alleghany did not have a carrier status (and therefore was not under the jurisdiction of the Commission) because the Commission had made no order in connection with the acquisition of stock of the three New England railroads and because, although Alleghany had control of the three carriers through Central, it did not "acquire control" when Central acquired the stock of the three companies, agreeing with the District Court that "where a non-carrier is 'already in indirect control of a carrier' and the transaction relied upon 'still leaves the non-carrier in indirect control of such property, no acquisition by the non-carrier results from the merger' ".

The case was argued by Whitney North Seymour for appellant Alleghany Corporation, by Robert W. Ginnane for the Commission, by Harold H. Levin for appellant Joseph S. Gruss, by Alexander Kahan for appellant Adelaide Neuwirth, and by George Brussell for Breswick and Company.

Securities and Exchange Commission . . .
judicial review

Securities and Exchange Commission v. *Louisiana Public Service Commission*, 353 U. S. 368, 1 L. ed. 2d 897, 77 S. Ct. 855, 25 U. S. Law Week 4316. (No. 466, decided May 13, 1957.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Reversed.*

In 1953, acting under Section 11 (b) (1) of the Public Utility Holding Company Act of 1935, the Securities and Exchange Commission, after full hearing, directed two Louisiana utilities to divest themselves of all non-electric assets and gave them one year for compliance. No petition for review was ever filed, and the order ceased to be subject to judicial review sixty days after issuance. Later the S.E.C. extended the time for compliance with its order, and on November 10, 1954, the newly organized Louisiana Gas Service Corporation filed a joint "application-declaration" with the Commission proposing a transfer of the power properties to it in compliance with the divestment order. The S.E.C. issued notice to all interested persons, including the Louisiana Public Service Commission, which had taken no part in the earlier negotiations. On December 22, 1954, the Louisiana Commission requested the S.E.C. to grant a hearing upon the "application-declaration" and to reopen the Section 11 (b) (1) proceedings which had led to the divestment order. The S.E.C. heard oral argument on the Louisiana Commission's petition and, on September 13, 1955, it entered an order finding that there were not grounds for questioning . . . [its] earlier conclusion" and it denied the petition to reopen.

The Court of Appeals, with which the Louisiana Commission filed a petition for review, set aside the S.E.C.'s September 13, 1955, order. It also held that the legal determinations of the S.E.C. in its divestment order of March 20, 1953, were erroneous and in effect also set aside that order.

The Supreme Court reversed in a *per curiam* opinion. The S.E.C.'s order of September 13, 1955, was not subject to judicial review, the Court held. The Court of Appeals had apparently relied upon the language in Section 11 (b) which reads: "Any order made under this subsection shall be subject to judicial review as provided in section 79k of this title". The Court read this as meaning only directory orders "which may 'revoke or modify' any such order previously made under that subsection" but not "an order merely denying a petition to reopen §11 (b) proceedings".

Mr. Justice CLARK took no part in the consideration or decision of

the case.

The case was argued by Thomas G. Meeker for petitioner and by Robert A. Ainsworth, Jr., for respondent.

Taxation . . .
carry-over losses

Libson Shops, Inc. v. *Koehler,* 353 U. S. 382, 1 L. ed. 2d 924, 77 S. Ct. 990, 25 U. S. Law Week 4332. (No. 64, decided May 27, 1957.) *On writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Affirmed.*

The issue here was whether a corporation formed by the merger of sixteen separate businesses, which had filed separate income tax returns in previous years, might carry over and deduct pre-merger operating losses of three of its constituent corporations. The Court held that such a carry-over was not permissible.

The petitioner was originally a management corporation for sixteen separate corporations selling women's apparel at retail at separate locations in Missouri and Illinois. Each of the sixteen sales corporations was operated separately and filed its own income tax returns. The stock of all seventeen corporations was owned, directly or indirectly, by the same individuals in the same proportions. In 1949, all seventeen corporations were merged into the petitioner, new stock was issued, *pro rata,* and the entire business was thenceforth operated as a single enterprise. Before the merger, three of the sixteen selling corporations had shown net operating losses amounting to a total of some $22,000. Each of these units showed a loss in the year following the merger and petitioner claimed a deduction for the amount of the pre-merger losses as a carry-over under Section 23 (s) and 122 of the 1939 Internal Revenue Code. The Commissioner disallowed the deduction, the petitioner paid the resulting tax deficiency and sued for a refund in the District Court. The District Court dismissed the complaint and the Court of Appeals affirmed.

Mr. Justice BURTON spoke for the Supreme Court in disallowing the deductions. The Court pointed out that, if there had been no merger, the three units sustaining losses would have had no opportunity to carry over their losses. The statute was intended to permit a taxpayer to offset its lean years against its lush years, the Court declared, not to permit averaging of the pre-merger losses of one business with the post-merger income of another business operated and taxed separately before the merger. In short, the Court said, "petitioner is not entitled to a carry-over since the income against which the offset is claimed was not produced by substantially the same businesses which incurred the losses".

Mr. Justice DOUGLAS dissented without opinion.

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

The case was argued by Henry C. Lowenhaupt and Owen T. Armstrong for petitioner and by John N. Stull for respondent.

Taxation . . .
evasion

Achilli v. *United States,* 353 U. S. 373, 1 L. ed. 2d 918, 77 S. Ct. 995, 25 U. S. Law Week 4335. (Nos. 430 and 834, decided May 27, 1957.) *On writs of certiorari to the United States Court of Appeals for the Seventh Circuit. Affirmed.*

The question here was whether the petitioner could be prosecuted and sentenced under Section 145 (b) of the 1939 Internal Revenue Code, which makes it a felony to willfully evade the income tax, for an offense which he claimed was also punishable under Section 3616 (a), which makes it a misdemeanor to file a false return.

The petitioner was convicted of willfully attempting to evade federal income taxes by filing a false return. He was sentenced to concurrent two-year prison terms and was fined $2,000 on each of three counts. The Court of Appeals reversed the conviction on count one, but affirmed on counts two and three.

The Supreme Court affirmed in an opinion delivered by Mr. Justice FRANKFURTER. The Court held that the predecessor of Section 145 (b) repealed Section 3616 (a)'s applicability to income tax evasion. The Court found that the legislative history of the two sections supported this view and that that had been the Government's position as long ago as 1926, in spite of a recent line of cases, involving minor offenses, which treated the filing of false returns as misdemeanors under Section 3616 (a).

The CHIEF JUSTICE and Mr. Justice CLARK noted that they concurred in the result.

Mr. Justice DOUGLAS, joined by Mr. Justice BLACK, wrote a dissenting opinion which argued that, by its plain terms, Section 3616 (a) applied to "any" return. The dissent objected to the "mental gymnastics" which swept the ground out from under "dozens of criminal convictions which the Government has obtained under § 3616 (a)".

The cases were argued by Peter B. Atwood for petitioner and by Charles K. Rice for respondent.

What's New in the Law

The current product of courts, departments and agencies

George Rossman • EDITOR-IN-CHARGE

Richard B. Allen • ASSISTANT

Attorneys . . . *solicitation*

Deciding its second big solicitation case of the year (see *In re Cohn*, 10 Ill. 2d 186 (43 A.B.A.J. 447; May, 1957)), the Supreme Court of Illinois, splitting four to three, has refused to do more than censure a Chicago specialist in Federal Employer Liability Act cases who was charged with solicitation. The Court declared that the record did not contain "the believable, reliable, clear and convincing evidence that is required" in instances where disbarment is sought for unethical conduct.

The Court found most of the solicitation evidence to be in too great conflict to support a drastic disciplinary proceeding. Other charges—that the respondent conspired to permit an attorney unlicensed in Illinois to practice there and that he committed perjury in a Pennsylvania court—were not proved, the Court said. The Court remarked that many charges impugning the attorney's integrity had been dismissed by the commissioners who heard the charges under Illinois procedure, and it also noted with emphasis that forty-two judges and lawyers testified as character witnesses during the extended hearings.

But most damaging of all, the Court's opinion indicated, was the link between the proceedings against the attorney and railroads that were the usual targets of his litigation. The Court charged that the record showed that the case was prepared and presented by paid employees of the Railroad Claims Research Bureau, a group including at least twenty-one railroads, which retained an investigator and an attorney "to probe facts surrounding solicitations and present evidence to bar associations". This group, the Court continued, was permitted to work closely with The Chicago Bar Association, whose Board of Managers and grievances committee are constituted commissioners of the Illinois Supreme Court by court rule to hear and make recommendations on unethical practice cases. Deploring the tactics and subterfuges of the railroad group's investigator, the Court declared he was "more interested in disbarring respondent than in determining the facts".

Said the Court:

> . . . The time and energy of the railroads devoted to this proceeding might well have been spent in perfecting a code of ethics for railroad claim adjusters and in requiring its observance, for the improper activities of claim adjusters develop the climate in which solicitation of the type complained of in this proceeding may thrive.

The Court concluded by censuring the attorney for not testifying in his own behalf.

The three dissenters thought this inadequate for the "general solicitation shown in this record", and they particularly objected to the majority's denial of rehearing to permit eighteen railroads and the embattled investigator to defend themselves against the charges made in the opinion or to hear new evidence allegedly demonstrating a clear pattern of systematic solicitation and proving that the respondent instructed his runners to evade service of subpoenas.

(In re Heirich, Supreme Court of Illinois, June 15, 1956, as modified on denial of rehearing March 20, 1957, *per curiam*, 10 Ill. 2d 357, 140 N.E. 2d 825.)

Attorney and Client . . . *fees*

An attorney representing a wife in a matrimonial action cannot collect his fees from the husband after the parties have effected a reconciliation and the action has been abandoned, the Supreme Court of South Carolina has held.

Although there is law both ways on this question, the Court has followed the prevailing rule. The rationale of the conclusion, the Court explained, is that the state is interested in the continuance, rather than dissolution, of a marriage. Therefore, it continued, the public policy of the state and of its law is to encourage reconciliation of couples involved in matrimonial actions, and South Carolina statutes provide that specific attempts at reconciliation be undertaken. When a reconciliation takes place, it operates to end the litigation, the Court said, and to permit the attorney for one of the parties to continue the suit by an application for fees would mean defeating the end of the litigation the parties have accomplished.

(In re de Pass, Supreme Court of South Carolina, April 3, 1957, Moss, J., 97 S.E. 2d 505.)

Attorney and Client . . . *privilege*

The attorney-client privilege cannot be invoked to prevent a legislative investigating committee from publicly revealing a surreptitiously obtained recording of a conversation between a prisoner and his attorney. This is the four-to-three ruling of the New York Court of Appeals in the *Lanza* case.

The committee was investigating the parole violation of Lanza. During the investigation the newspapers announced that the committee would begin a series of public hearings during which it would make public a recorded conversation between Lanza and his attorney which took place in jail in February of

1957. Lanza and the attorney, alleging that the recording was obtained secretly and that its disclosure would violate the attorney-client privilege and Lanza's right to counsel, sought an injunction against the committee and its individual members and counsel.

The Court, emphasizing that the historic attorney-client privilege precludes disclosure by the attorney only, noted that revelation by persons who overhear a client-attorney conversation is not barred in New York, and declared: "It follows that when neither the attorney nor the client is examined as a witness, the [attorney-client privilege] statute does not create a right to prevent the disclosure of a confidential communication, and accordingly does not authorize a cause of action for an injunction."

The Court conceded that the recording was an unreasonable interference with Lanza's right to confer privately with his counsel, but it stated the issue was not vindication of that right, but rather the use of the recording. It indicated that if use of the recording were being attempted or sought in a proceeding against Lanza, the result would be different. But, it added, "Lanza's right to a fair trial is in nowise being impinged upon since there is no trial, present or prospective."

To claim authority to enjoin the committee, the Court said, would amount to a usurpation of power by one co-ordinate branch of government from another. "The legislature is as much a guardian of the liberties of the people as are the courts", it remarked. "We will not assume that a legislative committee will disregard its duty toward any individual who may in any wise be referred to in its public hearing."

One judge, dissenting, declared that the courts should not make themselves impotent to protect an individual's rights against violation by another branch of government. Referring to the *Steel Seizure Case (Youngstown Sheet and Tube Company* v. *Sawyer,* 343 U.S. 579), he wrote: "If the President of the United States can be stayed by the courts from seizing the steel mills during a national emergency, a New York state legislative committee can be enjoined from a gross violation of a citizen's personal rights, no less valuable, certainly, than Youngstown's property." He added that an injunction could be effective if only against the individual members and counsel of the committee.

Another dissenter felt that the rule that an eavesdropper may reveal the contents of a privileged attorney-client communication should have nothing to do with a situation where the communication is intercepted and preserved by a concealed device, which, he said, was in no sense a third person.

The third dissenter said the case presented something quite different from illegally obtained evidence, which nevertheless might be potentially admissible if properly obtained, because the recording could not have been obtained through a search warrant or a court order. He maintained that the recording was an unlawful interference with Lanza's right to counsel, regardless of whether Lanza was being investigated only or was involved in a judicial trial.

All three dissenters thought the complaint stated a cause of action.

(Lanza v. *New York State Joint Legislative Committee,* New York Court of Appeals, May 24, 1957, Froessel, J.)

Censorship . . .
motion pictures

Chicago's movie censorship ordinance—already having survived an unsuccessful constitutional attack in *The Miracle* case (see 43 A.B.A.J 645; July, 1957)—has been found valid by the Court of Appeals for the Seventh Circuit in a case involving another French film, *The Game of Love.*

The Court proceeded from the principle established by the United States Supreme Court in *Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, that motion pictures are included in the free-speech protection afforded by the First Amendment and made applicable to the states by the Fourteenth, but added the familiar rule that free speech and expression are not absolute. One field in which they are not absolute, the Court remarked, is where lewdness and obscenity are involved.

Examining the Chicago ordinance, the Court found that it was clearly drawn and had been authoritatively interpreted by the Illinois Supreme Court in *American Civil Liberties Union* v. *City of Chicago,* 3 Ill. 2d 334 (40 A.B.A.J. 1087; December, 1954), where the Illinois Court held the words "immoral" and "obscene" synonymous and said the ordinance should be applied to individual films under the dominant-effect test.

The Court noted that "time and place variations in the consensus of the people" determine what is immoral and obscene, but, it said, violations of the standard are "generally and promptly protested by ordinary persons". The Court, after viewing the picture, had little trouble in agreeing with Chicago's police censors that it was "immoral and obscene".

(Times Film Corporation v. *City of Chicago,* United States Court of Appeals, Seventh Circuit, May 21, 1957, Schnackenberg, J.)

Courts . . .
right to transcript

Any member of the public has a right to a transcript of the jury charge in a criminal case upon payment of the regular charge for it, the Court of Appeals of New York has decided.

The decision vindicated the *New York Post,* which had requested a court reporter to prepare for it a transcript of the judge's charge to a jury which had acquitted a probationary police officer of manslaughter in 1955 at a trial from which no one had been excluded. At first the reporter agreed to furnish the transcript, but he changed his mind when the trial judge forbade him to do so. Two lower courts sustained the judge's position. See 143 N.Y.S. 2d 897 41 A.B.A.J. 748; August, 1955) and 147 N.Y.S. 2d 782

(42 A.B.A.J. 275; March, 1956).

The Court of Appeals reversed, however, finding reasons for its holding in public policy, the state's constitution and in statutes. Dismissing an argument that prohibition was not a proper remedy against the judge because he had acted in an administrative capacity in denying the transcript, the Court declared that where a suitor shows he is entitled to relief, relief is granted under code practice.

A charge to a jury, the Court continued, may be regarded as a "decision" and therefore within the ambit of the New York constitutional provision that ". . . judicial opinions or decisions shall . . . be free for publication by any person". Although the decision was not limited to newspapers' rights, the Court did note that a New York statute charges the press to publish "a fair and true report" of judicial proceedings.

As to the right to compel the reporter to produce a transcript, distinguished from the right of the judge to forbid such action, the Court found the reporter's notes to be "records or other papers in a public office" to which the public is entitled by New York Statute. The Court could find no law or statute providing for non-production of such a transcript.

Three judges concurred separately. One preferred to rest the decision on the ground that the trial judge had inherent power to direct the court stenographer to produce a transcript and that the judge's refusal was an abuse of discretion. The other two did not go along with the majority's statutory and constitutional interpretations, and would have based the ruling on the policy of the state as to public trials.

(New York Post Corporation v. *Leibowitz*, New York Court of Appeals, May 16, 1957, Fuld, J.)

Criminal Law . . . *criminal insanity*

The Court of Appeals for the District of Columbia Circuit is continuing its exegesis of the product-of-mental-disease-or-mental-defect criminal insanity test it adopted recently in *Durham* v. *U.S.*, 214 F. 2d 862, to replace the venerable right-and-wrong test of *McNaghten's Case*.

One of the grounds presented to the Court on appeal from a murder conviction was that two psychiatrists who testified for the Government based their testimony on examinations made before the Court adopted the *Durham* rule. The argument was that the examinations were therefore conducted with the view of determining whether the defendant knew right from wrong, and not from the base of the broadened rule.

But the Court declared that this interpretation of *Durham* was fallacious. "The rule laid down in *Durham* requires no different examination by the psychiatrist, but only a different examination of the psychiatrist by the lawyers", the Court explained. The rule simply means, the Court continued, that the psychiatrist can testify in terms of mental health or illness, without expressing his opinion on such non-medical things as "malice", "right-and-wrong" and "criminal intent". The permissible testimony might well include, if the psychiatrist were willing to commit himself, whether the defendant knew the difference between right and wrong or whether he acted on an irresistable impulse, the Court said. If such testimony is offered, it observed, the jury should be instructed to consider it in determining the basic question under the *Durham* rule: whether the "unlawful act was the product of mental disease or defect".

On this much of the instant case, the full bench of the Court was agreed, but it divided five-to-four on whether the conviction should be reversed on another ground. The majority reversed because the prosecuting attorney in his argument, while telling the jury that what he said was not evidence, had nevertheless stated that it was his belief that some defense witnesses had perjured themselves and later said that he would not make such an accusation unless he could prove it. The four dissenters argued that the majority had read more into the prosecutor's summation than was there, that no objection to the remarks had been raised either at the trial or in the appeal and that in any event the error was not prejudicial or reversible.

(Stewart v. *U. S.*, United States Court of Appeals, District of Columbia Circuit, April 18, 1957, Edgerton, C.J., announced the judgment and division, Bazelon, J., majority opinion.)

Criminal Law . . . *Sobell sequel*

Morton Sobell, convicted with the Rosenbergs in 1951 for espionage conspiracy, has lost another attempt to gain freedom through an application under 28 U.S.C.A. §2255. The Court of Appeals for the Second Circuit has agreed with the district judge who denied a hearing on two petitions on the ground that "the files and records of the case conclusively show that the prisoner is entitled to no relief", using the language of the statute.

Because of what it termed the "serious and sensational character" of the charges made in the petitions, the Court examined them at some length, but termed them "utterly groundless". One petition alleged that the prosecution had used perjured testimony and evidence, had made false representations to the trial court and had suppressed evidence favorable to Sobell. The other charged that the United States and the trial court lacked jurisdiction to try Sobell because he was returned to the United States from Mexico in violation of a treaty between the countries.

(U.S. v. *Sobell*, United States Court of Appeals, Second Circuit, May 14, 1957, Medina, J.)

Fair Trade . . . *mail-order sales*

The Court of Appeals for the Second Circuit has joined the Fourth Circuit in ruling that neither the McGuire Act nor state fair-trade laws can be employed to preclude below-fair-trade mail-order sales from

a non-fair-trade state to a fair-traded area.

The case involved mail-order sales from a corporation operating in the District of Columbia, a free-trade jurisdiction, to customers in New York at less than the resale price established in New York by price maintenance agreements. The District of Columbia corporation was wholly owned by a New York corporation, which maintained a retail store in New York where order blanks for the District operation were available. New York, of course, is a fair-trade state.

The suit, brought by a manufacturer, was for an injunction under the New York fair-trade act. The United States District Court for the Southern District of New York viewed the District of Columbia corporation as a mere dummy of the New York retailer, organized for the purpose of evading the New York law, and it granted the injunction. 145 F. Supp. 57 (43 A.B.A.J. 259; March, 1957).

But the Second Circuit reversed. Chief Judge Clark, writing the judgment of the Court, declared that the New York act could not be applied because the resales took place outside the state. He said that title passed from retailer to customer in the District of Columbia, both because that was the intent of the parties and because of other indicia accompanying the sale, including the location of the retailer. Therefore, the Court added, no enforcement action could lie.

Judge Waterman, concurring separately, agreed that in the instant case the resales occurred in the District of Columbia rather than in New York, but he criticized too heavy reliance on the passage-of-title concept. He preferred to place the decision on the location of the retailer in a non-fair-trade territory. He implied that the proponents of fair trade, who had procured passage of the McGuire Act, were being bitten by the mouth they fed, for the purpose of the Act was to affirm states' rights in the fair-trade field, under which concept the District of Columbia had remained a free-trade area.

Judge Lumbard dissented. Noting the defendant's cut-rate selling background, he agreed with the district court that the Washington organization was nothing more than an out-of-state warehouse and office staff for the New York organization. He reasoned that the mail-order sales took place in New York.

By its decision the Second Circuit aligned itself with the Fourth Circuit's ruling in *Bissell Carpet Sweeper Company* v. *Masters Mail Order Company of Washington, D.C., Inc.*, 240 F. 2d 684. Also in agreement is the United States District Court for the District of Maryland, *Revere Camera Company* v. *Masters Mail Order Company of Washington, D.C., Inc.*, 129 F. Supp. 457.

(General Electric Company v. *Masters Mail Order Company of Washington, D.C., Inc.,* United States Court of Appeals, Second Circuit, May 15, 1957, Clark, C.J.)

Injunctions . . . *employment contracts*

An Ohio court has used an injunction to enforce a contract between an announcer-disc-jockey and a radio station which contained a covenant-not-to-compete type provision that the entertainer would not accept employment with a competing radio or television station for eight months after severance of employment.

The disc jockey was employed on an at-will basis under a contract providing for termination by either discharge, dismissal or voluntary action of the employee. It also provided that upon termination he would not accept radio or television employment at a station operating within a thirty-five mile radius of the employer's transmitter. Dissatisfied with a new format prescribed by the employer for his program, the entertainer walked out in the middle of a program and a week later was hired by a competing radio station in the thirty-five mile orbit.

Emphasizing the unique personality-type the announcer had developed for himself, the Court of Common Pleas of Montgomery County held that the employment restriction was not an illegal restraint of trade and that it could be enforced by injunction. The Court said it would be "incredible law" to permit the announcer to sever his employment by voluntary action and not be bound by the covenant not to compete.

The announcer argued that the radio station could not have an injunction to enforce the contract since the contract permitted its termination by unilateral action of the employer. But the Court answered this by pointing out that the termination occurred through voluntary action of the employee.

(Skyland Broadcasting Corporation v. *Hamby,* Court of Common Pleas of Ohio, Montgomery County, March 1, 1957, McBride, J., 141 N.E. 2d 783.)

Taxation . . . *prepaid rent*

In a field where some confusion has reigned, the Court of Appeals for the Eighth Circuit has decided that a cash-basis taxpayer need not treat prepaid insurance, which is clearly deductible as a business expense, as either a capital asset subject to depreciation or an expense which must be prorated over the insurance-life period. The proper treatment, the Court said, is deduction of all premiums during the year paid.

The Commissioner, following the lead of the First Circuit, has flip-flopped on the question. In *Welch* v. *DeBlois,* 94 F. 2d 842, the First Circuit ruled that prepaid insurance premiums were deductible in the year paid, but in *Commissioner* v. *Boylston Market Association,* 131 F. 2d 966, it agreed with the capital-expenditure theory under which such payments are only an amortized deduction. The Tax Court has solved the problem by holding that the cost of insurance for a one-year period, even though protection extends into a subsequent tax year, is a currently deductible expense, but that premiums for insurance for

longer than one year should be prorated.

After deciding that pre-paid insurance is not a capital asset, the Eighth Circuit pointed to the taxpayer's uniform treatment of premiums as deductions in the year paid and rejected the Commissioner's contention that this accounting method distorted income.

(Waldheim Realty and Investment Company v. *Commissioner,* United States Court of Appeals, First Circuit, June 4, 1957, Van Oosterhout, J.)

Trials . . . *communication with jury*

An oral communication by the trial judge to a jury, during its deliberations and in response to its request, has been found sufficient by the Court of Appeals for the Third Circuit to award a new trial.

After the jury had retired in a Federal Employers' Liability Act case and the trial judge had commenced another case, the jury sent a written inquiry to the judge asking whether the plaintiff was receiving workmen's compensation. Without notice to either counsel or their knowledge, the judge instructed the marshal to tell the jury that he wasn't.

Apparently this didn't clarify much for the jury, because it returned a curious verdict reading:

> Well we the jury unanimously agree that the defendant nor plaintiff is guilty of negligence. The jury also awards the sum of $5,000 and a life job at a guaranteed yearly wage to the plaintiff, Mr. George Snyder.

Plaintiff's counsel asked for a poll of the jury and they all answered that they did not find the defendant negligent. With this the trial judge entered judgment for the defendant.

The Court held that it is not proper for the trial judge to communicate with the jury in the absence of counsel and that the error of the trial judge in having done so was not harmless or collateral in the instant case. Neither, the Court said, was the particular inquiry inconsequential, because it might have had significant influence on the jury's somewhat bewildered verdict.

(Snyder v. *Lehigh Valley Railroad Company,* United States Court of Appeals, Third Circuit, June 5, 1957.)

Witnesses . . . *self-incrimination*

Deciding whether a witness has correctly claimed his privilege under the self-incrimination clause of the Fifth Amendment has become an increasingly active task for American courts. In the setting of grand-jury investigations of racketeering, rather than the more familiar legislative-committee investigations of Communists, the Court of Appeals for the Seventh Circuit has decided two Fifth-Amendment cases.

In one case the grand-jury witness refused to state what her address was when she lived in Collinsville, Illinois. Her refusal was based on her constitutional privilege against self-incrimination. To support this she offered to the judge who committed her for contempt several newspaper clippings showing that the grand jury was investigating the activities of a reputed gang leader, one of whose close associates was a man with whom the witness was closely linked and for whom the authorities were looking. She claimed the question was asked with the purpose of finding the whereabouts of the associate who the clippings implied was a frequent companion of the witness, fearing, apparently, that evidence of her associations might be material in a prosecution of her as a conspirator. The judge refused to consider the newspaper stories and committed her to jail for contempt when she persisted in her refusal to answer.

The Court ruled that the judge erroneously excluded the newspaper clippings. He should have received them to show the background and setting under which the privilege was claimed, it declared. "We think it evident from the implications of the question asked of the appellant, in the setting in which it was asked, that injurious disclosure could result from a responsive answer", the Court added.

One judge dissented. Saying that a witness before a grand jury stands in a different position from the accused in a criminal case, he thought that whether the clippings were considered had no effect on the case. Even assuming the complete truth of the newspaper stories, he said, the answer to the particular question could not be incriminatory.

(U.S. v. *Portell,* United States Court of Appeals, Seventh Circuit, June 4, 1957, Duffy, J.)

In the other case a defendant who had been convicted for perjury committed before a grand jury sought a reversal on the ground that he had not been advised of his right to remain silent under the Fifth Amendment when he appeared before the grand jury.

Agreeing with the Second Circuit's rationale in *U.S.* v. *Scully,* 225 F. 2d 113 (41 A.B.A.J. 955; October, 1955), the Court ruled that there is no requirement imposed by notions of fair play, or any other constitutional notion, that a grand-jury witness be warned of his privilege against self-incrimination, although the Court noted, that this was not a "hypothetical academic situation" where a witness is called before a grand jury particularly to elicit evidence helpful in indicting himself.

The Court pointed out, moreover, that the conviction was for perjury, not for contempt for invoking the Fifth Amendment. Noting that the oath had admonished the witness to speak the truth, the Court declared: "To argue, in substance, that if he had been advised of his constitutional right of silence he would not have perjured himself would be unsound, if not absurd."

(U.S. v. *Parker,* United States Court of Appeals, Seventh Circuit, May 27, 1957, Finnegan, J.)

Department of Legislation

Charles B. Nutting, Editor-in-Charge

Recent interest in planning and zoning makes the publication of the following article highly appropriate. The author is a Professor of Law in Indiana University, and is a recognized authority in the fields of land utilization and of legislation.

Sanctions Against Governmental Violations of Planning and Zoning Ordinances

by Frank E. Horack, Jr.

Apparently it is a characteristic of sovereignty, whether it be regal or democratic, to be unwilling to live by its own law. Typically, the executive, legislative and judicial branches of government support the sovereign's claim of immunity. Not infrequently the legislature expressly exempts the sovereign from statutory regulation. And the judiciary, in cases of ambiguity, strictly construe statutes because they are in "derogation of sovereignty".

This exemption of the sovereign from control is exemplified by statutes authorizing local units of government to adopt planning and zoning ordinances. Almost without exception, the legislature provides that "the powers extended to agencies, bureaus, departments, commissions, divisions, or officials of the state government by other state statutes . . . shall remain in full force and effect. Powers of supervision and regulation by such divisions of the state government over city, town, county, township and other local governmental units, individuals, firms or corporations also are not abrogated and shall continue in full effect."[1] Thus, the state remains outside local planning and land use control. The state is free to locate a new state highway garage in a single family residence district and destroy or materially damage the municipality's comprehensive plan.

No doubt it is also logical to exempt state regulated public utilities. But when they procure rights of way, particularly for oil and natural gas pipelines, without regard for the local plan they frequently remove hundreds of acres of land from local development and often from any practical use. Other utility exemptions are even more difficult to justify. For example, in at least one case, a local ordinance excluding motels and trailer camps was declared invalid because motels are like "inns" which at common law were utilities.[2]

Nor is the state the only offender. The expansion of federal services and activities has made the national government one of the largest, if not the largest, landowner today, and in the hierarchy of sovereigns it consistently asserts immunity from both state and local action.[3] Even where it is not directly a landowner, but regulates the activities of others, it may claim immunity. Thus local zoning which interferes with municipal air fields may be an invasion of federal sovereignty.[4] And where it is a participant in an interstate compact restricting land use it consistently reserves its power not to be bound by the compact.[5]

Adjacent municipalities by their independent action, interfere with or destroy the value of the master plan of their neighbors. Thus where two cities had common boundaries and both boundaries were zoned residential the New Jersey court found a vested right in the residential occupants of one city to prevent the change of land use in the other.[6] Other cases reflect the growing recognition by courts that in metropolitan areas the jurisdictional boundary of one municipality does not give it complete freedom to plan and manage land use without relation to the total urbanized area.[7] Inevitably, as Suburbia grows, the jurisdictional conflict must be resolved on a metropolitan basis.[8]

Paradoxically, the most frequent and probably the most serious violator of a city's comprehensive plan is the city itself. Most zoning ordinances declare that[9]

> after the adoption of a comprehensive plan by the commission the county and every city within the county shall be guided and give due consideration to the general policy and pattern of development set out in the master plan in the authorization, construction, alteration, or abandonment of public ways, public places, public structures, or public utilities. . . .

In spite of the common admonition the board of works, the city council, or the school board proceed with their own short range and usually short-sighted location of new structures. After expending substantial sums for professional study of land use, it is not uncommon for the city fathers to violate the plan and locate the new fire station, the school, the sewage disposal plant or the park without regard to the comprehensive plan which had attempted

1. Typical of such legislation is Indiana Acts 1947, c. 174, §93.

2. *Motor Cargo, Inc.* v. *Board of Trustees*, 117 N. E. 2d 224 (Court of Common Pleas, Ohio, 1953).

3. Note, *Eminent Domain: Intergovernmental Conflicts*, 29 Ind. L. J. 206 (1954).

4. Note, *Federal Control of Land To Protect Airport Approaches*, 48 N. W. L. Rev. 343 (1953); Smylie, *Constitutionality of Federal Airport Zoning*, 12 Geo. Wash. L. Rev. 1 (1943).

5. ". . . nothing contained in such compact shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of this compact." 54 Stat. 748 (1940). To the same effect, see: 52 Stat. 150 (1938); 50 Stat. 719 (1936); 49 Stat. 932 (1935).

6. *Cresskill* v. *Dumont*, 28 N. J. Super. 26, 100 A. 2d 182 (1953).

7. *La Salle National Bank* v. *Chicago*, 4 Ill. 2d 253, 122 N. E. 2d 519 (1954).

8. See, for example, Metropolitan Area Planning for Northeast Illinois and Northwestern Indiana, Metropolitan Housing and Planning Council, 1956.

9. Indiana Acts 1955, c. 283, §36.

to insure sound traffic patterns, quiet and peaceful residential areas and compatibility between commerce, industry and living area.

In most cities the plan commission, although politically independent, is also politically impotent to prevent the other agencies of local government from violating the plan. It is obvious that, even if fine and imprisonment were sanctions against municipal action, it would be politically unrealistic to expect them to be applied to those who hold the real power of local government. Thus, if the city's plan is to be enforceable against it, some other sanction is necessary. One experiment in this direction was attempted in the Indiana Metropolitan Plan Act of 1955.[10] The act applies to the City of Indianapolis, to Marion County, and to all the smaller cities within the county, and as other enabling acts it includes the usual admonitory clause that the cities and the county are to be guided and give due consideration to the general policy and pattern of development set out in the comprehensive plan.

In addition to this customary statement, Section 36 further provides:[11]

> Any action inconsistent with the evidence set forth in the comprehensive plan shall be presumed to be not in the public interest.

This apparently innocuous phrase may provide an effective sanction for the enforcement of the plan against the city and its officials. In effect, this section means that if land is to be taken by eminent domain for a specific purpose inconsistent with the comprehensive plan, proof of this inconsistency will establish presumptively that the taking is not for a public purpose. Likewise, if the governmental unit seeks to issue bonds for the erection of structures at locations inconsistent with the plan, no cautious bond house will underwrite the bonds nor will its attorneys approve the issue, for presumptively the public interest is not served. The constitutionality of this provision was attacked in *Mogilner v. Metropolitan Plan Commission*.[12] It was alleged that the provision violated Art. 1, §21 of the Indiana Constitution providing that: "... no man's property shall be taken by law without just compensation. ..."

The court rejected this allegation summarily with the statement that the section "does not relate to nor provide for the taking nor condemning of property".

Secondly, it was alleged that "the provision violated the due process provisions of both the Indiana and United States Constitution".

In response to this objection the court said:[13]

> It is, therefore, obvious that the "action" referred to in the last paragraph of Section 36 is action by city and county units in authorizing and constructing public improvements. . . . No constitutional requirement is violated by a statute which requires that actions by governmental units must be in the public interest, or as is usually stated, for a public purpose. . . .
>
> Moreover, the last paragraph of Section 36 merely creates a presumption which would be dissolved on showing the existence of public interest to the contrary. The Act does not provide that the presumption created is conclusive. It is well established that statutes which make evidentiary facts prima facie of certain ultimate facts, otherwise described as rebuttable presumptions created by statute, are valid. . . .

With the constitutionality of this provision apparently settled, it appears that further litigation on the point is not likely to arise because the provision is in a sense self-executing, that is, with customary banker's caution, a bonding house would refuse to underwrite an issue rather than gamble with a lawsuit. If this prediction is correct, then local municipal officials may be bound to respect their own officially adopted plans.

It is doubtful whether the expansion of this section to include all government agencies within the territorial jurisdiction of the plan commission can be effected. Once again the issue of sovereignty arises. No constitutional obstacle stands in the way of a state legislature agreeing that the agencies of the state will abide by the comprehensive plan of a local unit of government. Such action, of course, would not bind future legislatures, but until such a statute was amended or repealed there seems to be no reason why the executive and administrative agencies of government could not be required to comply with the local plan. The big hurdle is that a legislature is not likely to so restrain itself or its state departments or agencies. As between the many agencies of local government—city, town, county, township, special districts, school board, park and recreation district, etc.—the legislature could and probably would, place responsibility for planning in a single unit of government, the city, the county or the metropolitan district.

Perhaps this sanction against independent local action provides one of the less objectionable integrating forces in a metropolitan area. Without the necessity of creating a "super-government", integration of the planning activities of scores and often hundreds of independent governmental units within a metropolitan area might be effected.[14]

10. Ibid.
11. Id.
12. Ind. , 140 N. E. 2d 220 (1957).
13. *Supra* note 12, page 225.
14. *Supra* note 8.

Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, George D. Webster, Chairman.**

Interest on Judgments for Tax Overpayment

by Ervin M. Entrekin, Nashville, Tennessee

Section 6611 of the Internal Revenue Code of 1954 provides for interest at the rate of 6 per cent upon an overpayment of tax to a date preceding the date of the refund check by not more than thirty days, or, when the overpayment is credited against other liabilities, to the due date of the amount for which credit is taken or the date of assessment, as the case may be. The Judicial Code provides with respect to recovery of interest on judgments, as follows:

> In any judgment of any court rendered (whether against the United States, a collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal revenue tax, interest shall be allowed at the rate of 6 per cent per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. . . . [28 U.S.C. 2411(a)].

Several aspects of this latter provision should be specifically noted. It does not authorize the allowance of interest on an award of interest since there is no "overpayment" in such cases. Nor does it purport to cover interest on the crediting of judgment overpayments against other taxes or liabilities. As to such credits, the interest provisions of the Internal Revenue Code are presumably controlling. Moreover, two recent cases hold that judgment interest does not run from the date of the payment of the tax. In *Hoon Kwan Young* v. *United States,* 110 F. Supp. 237 (Hawaii, 1953), the court allowed judgment interest from the date taxpayer demanded refund, and in *General Motors Corporation, Frigidaire Div.* v. *United States,* 146 F. Supp. 220 (Ct. Cl., 1956), judgment interest was allowed from the date the overpayment arose and the taxpayer filed its claim for refund.

A more significant point in this latter case is the conclusion that judgment interest is to be paid notwithstanding an explicit provision in the Internal Revenue Code that no interest is allowable. The case arose when General Motors Corporation sued to recover certain manufacturer's excise taxes. A majority of the Court of Claims found for the taxpayer on the ground that the actual expense incurred by taxpayer in fulfilling the four-year warranty of its cooling units was an "allowance" within the meaning of Section 3443, I.R.C. 1939.[1] Since Section 3443(a)(2) was the statutory basis of recovery, it was necessary to determine whether Section 3443(c) prevented the inclusion of interest in the judgment. Section 3443(c) provides that:

> Interest shall be allowed at the rate of 6 per centum per annum with respect to any amount of tax under this chapter credited or refunded, except that no interest shall be allowed with respect to any amount of tax credited or refunded under the provisions of subsection (a) hereof.

The majority opinion concluded that this interest prohibition was applicable only to refunds made administratively, and did not affect the application of 28 U.S.C. 2411(a), *supra,* when the taxpayer took its case to court and obtained judgment.

The first and only other opinion to adopt this reasoning was *Carter* v. *Liquid Carbonic Pacific Corporation,* 97 F. 2d 1 (9th Cir., 1938). There, the taxpayer sued the collector of Internal Revenue rather than the United States. Although interest is not allowable against the United States except by specific statute, it is allowable as damages in suits against directors. A suit against the director is a personal action, and there is nothing to prevent enforcement of interest the same as in any other action against a private citizen. *Huntley* v. *Southern Oregon Sales, Inc.,* 104 F. 2d 153 (9th Cir., 1939). For this reason, the result reached in the *Liquid Carbonic* case might be justified on grounds other than those stated in the opinion.

As recently as 1952, the Court of Claims interpreted its allowance of interest "as provided by law" to mean that judgment interest in a suit against the United States *was* subject to the prohibitions contained in the Internal Revenue Code. *Higginson* v. *United States,* 100 F. Supp. 763. This case had been decided on the merits in 1948, and the court ordered refund with interest at 6 per cent per annum. *Id.,* 81 F. Supp. 254. In computing the amount of interest, the Commissioner excluded interest during the time that the taxpayer was outside the Americas as required by Section 3804, I.R.C. 1939. Taxpayer protested and brought suit in the District of Columbia to compel the Commissioner to pay the excluded interest. *Higginson* v. *Schoeneman,* 190 F. 2d 32 (D.C. Cir., 1951).[2] It

1. It is interesting to note that the majority of the Court of Claims subsequently decided to reverse itself for later years and allow the taxpayer's claim under Section 3441(a) rather than 3443(a)(2). This means that the interest prohibition of Section 3443(c) has no applicability. However, the claim would then be limited by Section 3443(d). The Court failed to discuss this new limitation. *General Motors Corp., Frigidaire Division* v. *U. S.,* 147 F. Supp. 739 (Ct. Cls., 1957).

2. Section 3804(a) also applied to the time within which suit could be brought. This no doubt influenced the court for it would be unfair to allow an extended time for filing suit and still permit interest on the refund to run.

was held that unless the Court of Claims modified its judgment, the Commissioner could not exclude such interest. Thereafter, the Government filed a motion in the Court of Claims requesting that it modify the judgment. The court accepted the Commissioner's interpretation of "interest as provided by law", and held that Section 3804 prohibited the allowance of interest on a judgment refund during the time taxpayer was outside the Americas. The same conclusion had been reached in *Tree* v. *United States,* 75 F. Supp. 467 (Ct. Cl., 1948). See also *Pearson* v. *United States,* 14 F. Supp. 1016 (Ct. Cl. 1936), *motion for new trial denied,* 17 F. Supp. 527, *certiorari denied,* 300 U.S. 678, and *rehearing denied* 301 U.S. 712 (1937); *Morgan* v. *United States,* 18 F. Supp. 1017 (Ct. Cl., 1937). The majority opinion in the *General Motors* case may have overruled these earlier decisions.

In the Internal Revenue Code of 1954, there are fifteen separate statutory exceptions to the general provisions for interest. Most of them are cross-referenced in Section 6612, I.R.C. 1954. But the cross-reference is incomplete. See, *e.g.,* Section 547 (b) relating to overpayment based on personal holding company deficiency dividend deductions; Section 1321 (a) relating to involuntary liquidations of LIFO inventories; Section 1335 relating to elections by taxpayers for application of Section 1333; Section 1481 (b) (3) relating to mitigation of effect of renegotiation of government contracts; and Section 7508 (a) relating to taxpayers in combat zones.

The *General Motors* decision, *supra,* if allowed to stand, will leave these statutory prohibitions ineffective when the judgment overpayment is refunded to taxpayer, but it is difficult to believe that the rationale of this decision would justify an interest allowance on a judgment overpayment which is credited against other taxes or liabilities. This possible distinction should not be permitted to develop. If Congress desires to avoid the effect of the *General Motors* and *Liquid Carbonic* decisions and make the prohibitions against interest applicable in all cases it should amend 28 U.S.C. 2411 (a) to provide, as follows:

> In any judgment of any court rendered (whether against the United States, a director or deputy director of Internal Revenue, a former director or deputy director, or the personal representative in case of death) for any overpayment in respect of any internal revenue tax, interest shall be allowed only under a contract or Act of Congress expressly providing for payment thereof.

On the other hand, if Congress approves the result reached in the *General Motors* case and desires to limit the prohibitions against interest to administrative refunds, it should enlarge 28 U.S.C. 2411 (a) to provide for interest on credits as well as refunds.

While some change in the Judicial Code seems desirable, it is even more important that the provisions of the Internal Revenue Code be revised. As matters now stand, there is nothing short of a judgment to encourage the Commissioner to expedite his consideration of refund claims involving those sections which prohibit the allowance of interest. Generally, these provisions should be amended to provide merely that no interest shall be allowed if any overpayment of tax is refunded within six months after claim for refund is filed. Although such amendments would not provide a complete solution, since there could be controversies regarding the adequacy of the claims for refund, it would be more desirable than the present situation where interest is eliminated altogether. Under this or a similar proposal, the Commissioner would be allowed a reasonable time to make the refund without interest and, at the same time, be liable for interest where there is undue delay regarding questionable claims.

OUR YOUNG LAWYERS

Kirk McAlpin, Secretary and Editor-in-Charge, Savannah, Georgia

Under the enthusiastic leadership of Warren W. Eginton, of Stamford, the Connecticut Junior Bar Section has engaged in a number of interesting projects.

Especially notable was the fifth annual mid-winter institute and dinner sponsored jointly by the Junior Bar Section and the Life Insurance and Trust Council of Connecticut, held at the Yale Law School on March 25.

A new *Jury Pamphlet,* replacing an out-dated publication, was issued this year under the auspices of the Citizenship Committee, chairmanned by Edwin K. Dimes, of Westport. Actual work of compiling the manual had been done during the previous year under Chairman Dimes, in conjunction with Judges House and Phillips of the Superior Court.

L. Stewart Bohan, of New Haven, Chairman of the Committee on Court Reorganization, has rendered assistance to the senior State Bar Association in the collation of the questionnaires distributed on the Court Reorganization Bill. He has enlisted speakers to inform the public on the merits of the bill and circulated material for addresses.

David F. Babson, Jr., of Stamford, Chairman of the Editorial Committee, has prepared material for an *Attorneys' Cost Pamphlet,* which will be published in the September issue of the *Connecticut Bar Journal.* Later, reprints will be made available to lawyers throughout the state.

As in the past, emphasis was this year again placed on work with Connecticut's law students, under the direction of Carl W. Nielson, of Hartford. Sponsorship was accepted for the Moot Court Competition in the New England states. A series of luncheon-lectures was held for third-year law students at the University of Connecticut. A course in Connecticut procedure was also given to bar candidates who took the state examination.

Under David Goldman, of New Haven, the Membership Committee arranged a luncheon for newly admitted lawyers in February. This Committee is presently compiling a roster of non-members in the state with a view toward conducting an intensive campaign.

Anthony V. DeMayo, of New Haven, is chairman of the Public Information Committee. In addition to securing newspaper coverage of Junior Bar news, he prepared and circulated to Connecticut papers a series of four articles dealing with various problems of law.

To meet statewide demands, a Speakers' Bureau, led by F. Richards Ford, of Stamford, has been established. The Bureau joined with the Stamford Bar Association to present a mock trial publicly for which a citation of merit was received.

Under the chairmanship of Sid Miller, of New Haven, the Traffic Court Committee is energetically presenting its program. The Visitor-Violator program has been put on in various cities, enlisting the help of women's organizations and other groups. Miller has stressed decentralization, utilizing innumerable people on his committee, and thereby has increased interest and effectiveness. Plans are now under way for a special traffic courts institute, designed especially for municipal judges.

The very active Executive Committee has continued to hold its regular monthly meetings, which are always well attended.

Chairman Farrer's Annual Report

Interesting excerpts from Chairman Farrer's annual report are given:

"The primary objectives of the Junior Bar Conference during the calendar year 1957 have been to increase its liaison and its support by state and local affiliate units through a reorganization of the structure of the Conference, to coordinate its activities with the Senior Bar and, as to public service, to emphasize traffic safety. The Conference is the only Section of the American Bar Association which operates on a calendar year, and this report represents its accomplishments to and including June 15, 1957.

"(1) Reorganization of the Conference was approved at the midyear meeting of the Junior Bar Conference Executive Council in Chicago on February 16, 1957, and will be submitted to the general session in New York. The changes were based upon increasing J.B.C. membership from 10,000 to 25,000 by virtue of the special membership drive, and will create as a governing body a House of Delegates modeled after the Senior Bar's House of Delegates . . . .

"(2) A close relationship with state and local affiliate units has been encouraged by Circuit Meetings of State J.B.C. Chairmen in the Fourth Circuit at Richmond, Virginia, on April 4, 1957; the Tenth Circuit at Denver, Colorado, on May 10, 1957; the Sixth Circuit at Cincinnati, Ohio, on June 2, 1957; and the Seventh and Eighth Circuits at Des Moines, Iowa, on June 8, 1957, which brought together twenty-four State J.B.C. Chairmen with one national officer and the Circuit Councilmen present. Circuit meetings in other Circuits will be scheduled.

"(3) In extending our participation with Senior Bar committees, the Junior Bar Conference has accomplished the following:

"(a) The promotion of American Bar Association membership is a paramount objective. Participation in state admission ceremonies has been extended to breakfasts,

luncheons, coffee hours and the like, and solicitation continues at state and local regional meetings.

"(b) We have extended our interest in American Bar Association regional meetings, and on May 9, 1957, co-sponsored with the Insurance, Negligence and Compensation Section a panel on trial tactics at the Denver Regional Meeting.

"(c) Our Unauthorized Practice Committee is assisting B. F. McKinnon, Project Director of the American Bar Foundation, in the collection of agreements with lay groups and in working with the Editor of the *Unauthorized Practice News.*

"(d) Our Military Service Committee continues to work with the American Bar Association Committee on Legal Services and Procedure. It is expanding its efforts to assist young lawyers in military service, both in assignment to Judge Advocate Units and supporting Senate Bill 1165. The midyear meeting of the Conference in Chicago was attended by representatives of the Judge Advocates General of the Army, Navy and Air Force. This Committee is also working with the Judge Advocates School in Charlottesville, Virginia.

"(e) The Chairman of the Conference has been privileged to act as an observer at the meetings of the Board of Governors.

"(f) Our special Bi-Partisan Committee on Retirement Benefits continues to work with the American Thrift Foundation in support of the Jenkins-Keogh Bill and similar legislation.

"(g) Our Medico-Legal Committee has co-operated with the Law Department of the American Medical Association in the presentation of Medico-Legal Symposiums at local meetings in Seattle, Denver and Atlanta, and is encouraging adoption of a medico-legal code and the creation in law schools of a course in medical instruction.

"(4) The Conference has dedicated itself to the promotion of traffic safety and embarked on two ambitious programs:

"(a) Working with the American Bar Association Traffic Courts Committee and the General Federation of Women's Clubs, we are supporting the 'Go to Court as a Visitor, Not as a Violator' project. This was initially set for the period May 15 to June 15, 1957, but will be extended during the balance of the year. At present, forty-nine cities with J.B.C. directors are participating in this program.

"(b) We will conduct a state-by-state survey of traffic court conditions, which has been financed by an initial grant of $10,000 from the Automotive Safety Foundation. The directors of the Conference met with Justice Vanderbilt and J.B.C. Traffic Court Committees have been appointed in each state. . . . The minimum goal of this program is to assure that each traffic court judge is a lawyer and that he is paid a salary rather than a percentage of the fines that are levied. This program was under the original sponsorship of the late Chief Justice Arthur T. Vanderbilt, of New Jersey.

"The Conference is particularly indebted to the officers of the American Bar Association and to the members of the Board of Governors for their encouragement and assistance."

Liaison With the Judge Advocate's School

As a result of the work of John Nolan, Chairman of the Military Service Committee, and James J. Bierbower, who resigned the chairmanship of the Committee to become Council Representative from the District of Columbia, Captain Emory M. Sneeden has been appointed to further the interests of the J.B.C. by Colonel John G. O'Brien of the Army Judge Advocate General's School at Charlottesville, Virginia.

At a carefully planned and well-scheduled meeting held at the Judge Advocate General's School on May 20, Bierbower talked on the various aspects of bar association work and the possible contribution of military men; Nolan explained the activities of his Military Service Committee; and Captain Wilton B. Persons, who represented the Army at the Midyear Meeting in Chicago, gave the views of a military lawyer who has attended an ABA-JBC meeting.

Colonel O'Brien, who considers active participation in Bar work of great importance, in expressing his appreciation for the program stated that he had had favorable comments from student officers.

Present plans are to give similar programs for future classes three times a year.

BAR ACTIVITIES

Charles Ralph Johnston • Editor-in-Charge

James M. MURPHY

The State Bar of Arizona held its 24th Annual Meeting in Prescott on May 23, 24 and 25, with President Keith F. Quail, of Prescott, presiding. Other meetings held in conjunction with the meeting of the State Bar were the Judges Association, the Arizona Conference of Bar Presidents and Secretaries and the Arizona Bar Past Presidents' Association. Almost 400 registered and attended the meetings.

Elected to serve as officers during the coming year were James M. Murphy, of Tucson, President; C. A. Carson III, of Phoenix, First Vice President; Devens Gust, of Phoenix, Second Vice President; and Jerry H. Glenn, of Phoenix, Treasurer. D. E. Phillips is the Executive Secretary. New members of the Board of Governors are Ralph Brandt, of Yuma; Jerry H. Glenn, of Phoenix; and Hugh H. Kingsbury, of Prescott.

Approval had been given for the printing of 2,000 copies of the new Convention Rules of Order in pocket-booklet form for distribution to members of the Bar preceding the meeting. This is a first among bar associations.

Among the resolutions adopted was one recommending passage of the Jenkins-Keogh bill and another approving the conclusions of the American Bar Association's Special Committee on Communistic Tactics, Strategy and Objectives to the effect that bar associations have an obligation to oppose not only Communist lawyers but Communism itself and to review carefully the records of any offending attorneys, should they arise, and present them to the court for the determination of the fitness of those attorneys to continue as officers of the court.

Emile Z. Berman and Harry A. Gair, both of New York City, appeared together on a trial tactics seminar in the personal injury area of medico-legal practice. Mr. Gair gave significant aspects in the trial of a plaintiff's negligence action, and Mr. Berman spoke from the viewpoint of a defendant.

John Ben Shepperd, of Odessa, Texas, former Attorney General of Texas, made an address on the subject of "The Lawyer—Freedom's Advocate" at the Annual Meeting Luncheon.

Speakers at other sessions were Dean Robert J. Farley, of the College of Law, University of Mississippi, on the subject of "Obfuscations of a Law Professor" and Henry Fountain Ashurst, of Washington, D. C., former United States Senator from Arizona, whose topic was "A Nation's Genesis".

W. W. TAYLOR

The 59th Annual Meeting of the North Carolina Bar Association was held at Blowing Rock on June 12-15 with over 300 of the 1650 members registered. President Nelson Woodson, of Salisbury, presided. The first Conference of Local Bar Presidents met in conjunction with the Association meeting and elected Warren C. Stack, of Charlotte, President; Robert A. Merritt, of Greensboro, Vice President; and Thomas R. Eller, of Brevard, Secretary-Treasurer.

The new officers of the North Carolina Bar Association are: W. W. Taylor, Jr., of Warrenton, President; Beverly C. Moore, of Greensboro, President-Elect; Emery B. Denny, of Raleigh, J. Will Pless, of Marion, and Shearon Harris, of Albemarle, Vice Presidents. William N. Storey, of Raleigh, was re-elected Executive Secretary. New members of the Board of Governors are Charles H. Livengood, Jr., of Durham; Louis J. Poisson, Jr., of Wilmington, Ralph M. Stockton, Jr., of Winston-Salem; Kester Walton, of Asheville; Thomas J. White, of Kinston; and A. Pilston Godwin, Jr., of Gatesville.

In his summation of the achievements of the year, President Woodson cited particularly the successful work of the Committee on Legislation to secure seven research assistants for the members of the Supreme Court of North Carolina.

One of the most enjoyable and instructive events on the program was the "Demonstration of a Tax Case". This presentation demonstrated the handling of a federal estate tax case from the initial interview between the client and the attorney to the meeting with the Group Chief, to the Appellate Division and finally the trial in the Tax Court.

The Committee on Calendar Control submitted a report containing suggested rules for calendar making with the following objectives in mind: (a) prompt trial of cases on the dockets; (b) greatest possible convenience and least loss of time for attorneys, litigants, witnesses and the courts; (c) disposal of old cases and putting dockets in current condition; and (d) development of a sense of responsibility toward the public and a sense of co-operation between attorneys, court officials, law enforcement groups and other branches of government. The Committee recommended that the local Bars in the state study the rules suggested with a view to adopting definite rules or revising existing rules.

The principal speakers were Chief Justice J. Wallace Winborne, of the Supreme Court of North Carolina; Whiteford S. Blakeney, of Charlotte, who gave "A General View of Labor Law"; and Governor Frank G. Clement of Tennessee who spoke at the Annual Banquet.

The Young Lawyers Section elected the following new officers: William E. Poe, of Charlotte, Chairman; Roger B. Hendrix, of Winston-Salem, Vice Chairman; and Lawrence M. Johnson, of Aberdeen, Secretary-Treasurer.

R. E. ANDERSON

The first Annual Meeting of the State Bar of Wisconsin, following its integration last year, was held in Delavan on June 12, 13 and 14, with 540 members in attendance. President Robert D. Johns, of La Crosse, presided.

The newly elected officers are R. E. Anderson, of Superior, President; Charles L. Goldberg, of Milwaukee, President-Elect; William Frawley, of Eau Claire, Treasurer; and Charles Curran, of Mauston, Secretary. Phillip S. Habermann is the Executive Director.

President Johns reported on the progress of the new headquarters building for the State Bar which is expected to be completed early in 1958. He said that because of the integration of the Bar the membership before the end of 1957 will be in excess of 6,300 lawyers. This will include nearly 1,000 lawyers who are living outside the state, most of whom have maintained inactive memberships.

The programs of the Sections were an important and instructive part of the meeting. The Real Property, Probate and Trust Section, with James Ward Rector, of Milwaukee, presiding, heard the following addresses: "Problems in Will Drafting", by John C. Geilfuss, of Milwaukee; "Report on Legislative Matters Concerning Real Property, Trust and Probate Law", by Thomas B. Fifield, of Milwaukee; and "Problems in Changing Wisconsin's Water Law", by Professor J. H. Beuscher, of Madison.

Participants in a panel on "Handling an Unfair Labor Practice Case Before the NLRB" before the Labor Law Section were O. S. Hoebreckx, of Milwaukee, and David Robinovitz, of Sheboygan. The Section also heard a discussion of "The Function of the Federal Mediation and Conciliation Service" by Robert H. Moore, of Washington, D. C.

Richard R. Teschner, of Milwaukee, presided over the meeting of the Taxation Section, which heard interesting discussions of tax problems by Robert E. Nelson, of Green Bay, and Richard L. Greene, John L. Palmer and Richard R. Teschner, all of Milwaukee.

Trial tactics with emphasis on exhibits was the subject of an address by Harold S. Sawyer, of Grand Rapids, Michigan, before the Insurance Section. The other speaker before this Section was Edwin Conrad, of Madison, whose subject was "Preparation and Use of Colored Photographs".

David Park Jamieson, Q. C., of Sarnia, Ontario, Canada, was the speaker at the Annual Dinner.

The 76th Annual Meeting of the Bar Association of Tennessee was held June 13-15 in Chattanooga, with President Clarence Kolwyck presiding. By amendments of the Constitution and By-laws, the Association will hereafter be called the Tennessee Bar Association, and dues have been increased from $5.00 for junior members and $10.00 for senior members to $7.50 and $15.00. Six hundred members attended the meeting.

New officers elected to serve for the coming year are Charles G. Morgan, of Memphis, President; Lon P. MacFarland, of Columbia, President-Elect; J. Hamilton Cunningham, of Chattanooga, and J. D. Senter, of Humbolt, Vice Presidents; and J. Victor Barr, Jr., of Nashville, who was re-elected Secretary-Treasurer. John C. Sandidge, of Nashville, is the Executive Secretary.

Charles G. MORGAN

Louis Leftwich, of Nashville, W. Edward Quick, of Memphis, and Hallman Bell, of Cleveland, were elected to serve on the Central Council, the governing body of the Association.

The Taxation Section had an interesting program with a panel discussion on "Tax Aspects of the Tennessee Employment Security Law" with Donald M. McSween, of Newport, Commissioner of the Tennessee Department of Employment Security, acting as moderator. Four other speakers before the Taxation Section from the Tennessee Department of Employment Security, were Carl T. Anderson, Deputy Commissioner; John A. Travis, Chief of Contributions; Emmett Conner, Director, Unemployment Compensation Division; and W. L. Moore, Chief Counsel, all of Nashville.

The Real Property, Probate and Trust Law Section heard addresses by Raymond B. Witt, Jr., of Chattanooga, on "Booby Traps in Drafting Wills and Trusts"; and by French B. Frazier, of Chattanooga, on "Controlling the Use of Land".

Associate Justice Pride Tomlinson, of Columbia, of the Supreme Court of Tennessee, and O. L. Peeler, Nashville, Attorney for the Tennessee Department of Highways and Public Works, participated in a panel discussion on "Condemnation Procedure in Tennessee" before the County Attorneys Section.

Assistant Solicitor John J. Babe, of the United States Department of

Labor was the principal speaker at the meeting of the Labor Law Section. His subject was "The Walsh-Healey Public Contracts Act and the Davis-Bacon Act".

The Insurance Law Section heard addresses by Cecil Sims, of Nashville, on "The Excess Liability Problem and the Defense Trial Lawyer", and by Fred D. Cunningham, of Shelby, Ohio, on "The Home Office General Counsel Views the Excess Liability Problem".

An award of merit was presented to the Jackson-Madison County Bar Association for the most outstanding work of a local bar, and another award of merit was presented to Hugh Stanton, of Memphis, for contributing most to the organized bar.

At the annual banquet a plaque was presented to Malcolm McDermott, of McAllen, Texas, formerly of Knoxville, Tennessee, the senior past President of the Association.

Edward L. WRIGHT

The 59th Annual Meeting of the Arkansas Bar Association was held in Hot Springs on June 6 and 7, with President Eugene A. Matthews presiding and almost 500 of the Association's 1100 members in attendance.

Elected to serve during the coming year are Edward L. Wright, of Little Rock, President; John A. Foglemann, of West Memphis, Vice President; H. Maurice Mitchell, of Little Rock, Secretary-Treasurer. Miss Dorothy M. Orsini was reappointed Executive Secretary. Newly appointed members of the Executive Committee are W. S. Mitchell of Little Rock, Chairman; John D. Eldridge, Jr., of Augusta; and W. D. Murphy, Jr., of Batesville.

The Association adopted resolutions favoring the enactment of the Jenkins-Keogh Bill and creating a Committee for a Conference of Local Bar Associations and a Permanent Bar Headquarters Building Committee.

The principal speaker before the Junior Bar Section was David F. Maxwell, President of the American Bar Association, on "Service for Lawyers—an Important Function of the American Bar Association."

"The Living Power of Law" was the subject chosen by Judge Florence E. Allen, of the United States Court of Appeals, Sixth Circuit, before a luncheon session under the auspices of the Little Rock Association of Women Lawyers.

Other important speakers at later sessions were Senator John F. Kennedy, of Massachusetts; Congressman Brooks Hays, of Little Rock; and John R. Brown, Judge of the United States Court of Appeals, Fifth Circuit, who gave the address at the annual banquet.

Herbert Brownell, Jr., Attorney General of the United States, was the principal speaker at the 84th Annual Meeting of The Chicago Bar Association. His subject was "Protecting Civil Rights." Mr. Brownell spoke at the evening dinner session of the Annual Meeting held June 20 in the Association's headquarters.

Mr. Brownell discussed the part of the administration's civil rights program which would authorize civil suits for preventive relief in cases of threatened violation of federally guaranteed rights.

The main right at issue, he said, is that to vote, particularly in the South:

> The debate has centered around a proposed amendment to provide a jury trial in contempt of court cases growing out of willful disobedience to a lawful court order. This amendment for jury trial in contempt cases has such a serious impact upon the standing and effectiveness of the Federal courts that I feel warranted in calling it to the special attention of this professional group.

Mr. Brownell said opponents of the bill imply by their actions that

E. Douglas SCHWANTES

when it comes to civil rights, federal judges cannot be expected to apply "the same high standards of fairness and impartiality expected and received in other cases."

Mr. Brownell's appearance followed a noon session of the annual meeting at which new officers and board members were named.

The new officers are E. Douglas Schwantes, President; Jerome S. Weiss, First Vice President; Willis D. Nance, Second Vice President; Len Young Smith, Secretary; Clair W. Furlong, Treasurer; and Hubert L. Will, Librarian, who was re-elected. New board members elected are: John Rex Allen, Alfred J. Cilella, Donald H. Haider, Norman H. Nachman, Lawrence L. O'Connor, Walter W. Ross, Jr., and Francis H. Uriell.

Louis M. LOEB

Louis M. Loeb, was re-elected for a second term as President of The Association of the Bar of the City of New York at the Annual Meeting on May 14.

At the same meeting Dag Hammarskjold, Secretary-General of the United Nations, was presented an Honorary Membership in the Association. The presentation of the membership was made by Chief Judge Charles E. Clark of the United States Court of Appeals, Second Circuit.

The Annual Meeting, held at the

House of the Association, 42 West 44th Street, also elected the following Vice Presidents: Dudley B. Bonsal, Norris Darrell, John McKim Minton, George A. Spiegelberg and Paul W. Williams. Dean K. Worcester was re-elected Treasurer and Roger Bryant Hunting was elected Secretary.

Elected to vacancies on the Executive Committee were: David L. Benetar, James H. Halpin, Peter H. Kaminer and Breck P. McAllister. The meeting named the following to the Committee on Admissions: Howard Hilton Spellman, James L. Adler, Jr., Harman Hawkins, Eliot H. Lumbard, Maurice Rosenberg, Stanley R. Resor, W. Mason Smith, Jr., and Whitney North Seymour, Jr.

Mr. Loeb has served the Association in the past as Chairman of the Judiciary Committee, has been a member of the Grievance Committee, a Vice President and a member of the Executive Committee. He was Vice Chairman of the New York (Tweed) Temporary Commission on the Courts.

David G. BRESS

New officers and directors of The Bar Association of the District of Columbia were installed at the Association's Annual Meeting in Washington, D. C., June 11. Presiding was President Thomas M. Raysor.

The new administration was elected in a week-long mail ballot which closed several days before the meeting. This was the second year in which balloting was conducted by mail. Previously the vote was recorded on voting machines. The following officers were elected to serve until the 1958 annual meeting: David G. Bress, President; Joseph A. Kaufmann, First Vice President; Paul R. Connolly, Second Vice President; David C. Bastian, Secretary; and Charles Effinger Smoot, Treasurer.

The newly elected directors are: Nicholas J. Chase, George Morris Fay, Thomas B. Heffelfinger, James M. McInerney and Richard L. Walsh. Also named to the Board were James J. Bierbower, representing the Junior Bar Section, and John D. Conner, representing the Administrative Law Section.

Included in the business of the Annual Meeting was formal recognition of a local newspaper man. He was William G. Pollard of the (Washington) *Evening Star*, who has covered Washington courts for more than fifteen years. Part of the text of the resolution which recognized him read:

> . . . his readily understandable and well-prepared explanations of the [legal] matters reported have supplied a valuable understanding to the community of these events. At the same time, his reports have served to provide an important public appreciation of the works of the Bench and the Bar.

Radio station WOWO, Fort Wayne, Indiana, recently received the coveted George Washington Gold Medal Award of Freedoms Foundation, of Valley Forge, Pennsylvania, for the day-long program carried on Columbus Day, October 12, 1956, in co-operation with the Indiana State Bar Association American Citizenship Committee. Alexander Campbell, of Fort Wayne, is the Chairman of the Committee which arranged the program.

This program attracted nationwide attention and resulted in station WOWO being selected by Freedoms Foundation from all others in the nation as the best program on American citizenship in 1956.

In the Public Service

■ **We ask every bar association which has published any public service pamphlets, leaflets or other materials to make them available to any other association interested, for a nominal charge, with permission to adapt, reproduce and distribute them under the name of such other association.**

We shall be happy to serve as liaison agent in this matter and we ask every bar association to inform us whether it will, or is unable to, participate in this undertaking. From the secretary of every participating association, we should appreciate receiving a letter giving the requested permission and enclosing three copies of each such pamphlet, leaflet or other material; we then shall publish under the above caption the name and address of the association which prepared the material, its title and, if necessary, a brief resume of its contents.

To obtain the courtesy of using any public service materials mentioned in this section, the executive secretary or secretary of your association should write to the publishing association, enclosing a check for 50 cents for the first six copies or less plus 5 cents for each additional copy requested, to cover the costs of handling, packaging and mailing. If in special cases there is a greater charge for any item, the amount will be stated.

The Contingent Fee, by Carl L. Shipley, of the District of Columbia. XXIII THE JOURNAL OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, No. 11; November, 1956 (7 pages). Single copy: 30 cents. Order from The Journal of the Bar Association of the District of Columbia, 506 E Street, N. W., Washington, D. C.

Truly every cloud has a silver lining. Again we are indebted to a judge who knows little whereof he speaks and therefore unwittingly seeks to do a little good by perpetrating great evil. In this case the evil consists of a condemnation of contingent fees generally and a recommendation that they virtually be abolished.

The silver lining is the above

(Continued on page 768)

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe • Editor-in-Charge

ANTITRUST: I for one, and many others, look forward to Professor Milton Handler's "Annual Antitrust Review." In 1956 it took place on June 12, at the House of The Association of the Bar of the City of New York, 42 West 44th Street, New York 36, New York and was published in the *Record* of that Association for October, 1956, Volume 11, No. 7. Anyone interested can obtain a copy by writing the Association. No price is stated. If you have any doubt that the top antitrust problem today as yesterday is the relationship between a company and its dealers, that doubt is quickly dispelled by Milton Handler's discussion. Fourteen pages (368-381) of this thirty-page (367-397) speech are devoted to three dealer cases: *Webster Motor Car Co.* v. *Packard Motor Car Co.*, 135 F. Supp. 4, a decision by Judge Holtzoff in the District of Columbia under which a jury verdict for $190,000 against Packard for terminating a dealership in Baltimore was sustained and trebled; *Paramount Film Distributing Corporation* v. *Village Theatre, Inc.*, 228 F. 2d 721, a decision of the Tenth Circuit concerning an alleged inability of a suburban theatre to obtain first-run Paramount pictures because of an agreement between Paramount and its former exhibition company favoring downtown Salt Lake City houses, in which the Tenth Circuit reversed the trial court's ruling that any such agreement was unlawful per se and directed that under the rule of reason the case should have been submitted to the jury, and *Schwing Motor Co., Inc.* v. *Hudson Sales Corporation*, 138 F. Supp. 899, a decision by Judge Thomsen in Baltimore, where two disfranchised Hudson dealers brought treble damage suits; their complaints were dismissed on the ground that there was no injury to the public as it was able to buy Hudson cars at competitive prices, that Hudson's market position far from being dominant was about two per cent of all automobile sales and, most important of all, there was no horizontal conspiracy among competitors alleged, merely a vertical elimination of the two dealers by Hudson which Judge Thomsen declared Hudson had a legal right to do. Commenting, Professor Handler says:

> The one clear principle that emerges from these cases is that exclusive selling agreements do not per se violate the antitrust laws. At the very least the reasonableness of the restraint must be submitted to the jury under the rule of reason.

Handler would agree with Judge Thomsen that absent a monopolistic position in the industry and horizontal agreements among competitors, there was not only not a per se violation, but not even a case that could be submitted to a jury.

Along with these cases Handler called attention to the Department's criminal and equity cases in Chicago against the J. P. Seeburg Corporation, manufacturers of 40 per cent of the total national output of coin-operated phonographs. The Government charges that Seeburg has a series of vertical exclusive sales agreements under which each dealer agrees not to invade the territory of another and each distributor agrees not to sell directly to restaurants, taverns or other public places that use jukeboxes. Professor Handler believes this governmental attack was inspired by *Dr. Miles Medical Co.* v. *John D. Park and Sons Co.*, 220 U.S. 373, where Mr. Justice Hughes said:

> The [manufacturer] can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other.

He says the government relies on the "inference from their execution of separate but similar agreements with Seeburg" (page 379). Handler's view is that "the rule should be no different in the case of a series of restrictive territorial agreements than in the case of one such agreement" and "The controlling consideration should be whether, despite the absence of competition among the manufacturer's dealers, there is effective competition from other sellers."

> In short, the considerations of underlying antitrust policy formulated by Judge Thomsen in Hudson apply with equal cogency here. It will be interesting to see whether the courts will ultimately adopt this analysis. In the meantime, the rumblings from the Department of Justice sound ominous.

The balance of the Handler speech is directed to an attack on the "quantitative substantiality" doctrine of the *Standard Stations* case as presented to the Eastern District Court of Missouri by the Department of Justice and rejected by Judge Hulen's denial of a preliminary injunction halting the merger of the Brown and Kinney shoe companies (1956 Trade Cases, par. 68, 244). Professor Handler contends that despite the speech of the late trustbuster, now Judge Stanley N. Barnes, to the spring meeting of our Association's Antitrust Section at the Mayflower Hotel in Washington, D.C., April, 1956, in the *Brown Shoe* case, the Government contended there was no need to follow *Pillsbury* (F.T.C. Docket 6,000, 1953)

and make a market study of the effect of the merger on competition but that *Standard Stations* (337 U.S. 293), *Dictagraph* (217 F. 2d 821, Second Circuit) and *Anchor Serum* (217 F. 2d 867, Seventh Circuit) established that the merger was a per se violation of Section 7 of the Clayton Act.

Handler concludes by analyzing the consent decrees entered by the Department in the *General Shoe, Hilton* and *Minute Maid* cases. Pointing out that the *General Shoe* decree "does not provide for divestiture of the eighteen acquired companies," Handler concludes this "not only leaves those acquisitions undisturbed but impliedly approves them by permitting General to replace any lost outlets with new ones" (page 388).

The *Hilton* decree required disposition of the Jefferson Hotel in St. Louis, the Mayflower in Washington, D.C., and either the New Yorker or the Roosevelt in New York. It also limits Hilton to four hotels in New York, one in Washington, D.C., St. Louis and Los Angeles without Department or Court approval. Says Handler,

> Even more illuminating is what the decree does not do. It does not undo the Hilton-Statler amalgamation which eliminated the latter as a competitor in the hotel business, generally, or in servicing conventions. It does not require divestiture of hotels in any city other than the three where the chains were direct competitors. It does not prevent future acquisitions except in these cities and Los Angeles. And it does not prohibit acquisition even in these cities after 1960.

This is why since Handler spoke Hilton has been able (1) to buy two leading hotels in Cincinnati, the Netherlands Plaza and the Terrace Plaza, leasing the former and operating the latter; and (2) to sell both the New Yorker and the Roosevelt in New York, but to buy the Savoy Plaza.

In the case of Minute Maid that bought Snow Crop the consent decree made Minute Maid sell two of the three plants it obtained from Snow Crop and although the complaint asserted that Minute Maid had 20 per cent of the frozen citrus juice concentrate business and Snow Crop 15 per cent, Handler says the "decree sheds little light on the central question" (page 390).

As Handler sees it that central question is whether the validity of mergers shall be judged after a market study as in Pillsbury or per se on the quantitative substantiality theory of Standard Stations "where naked statistics, unexplained and uninterpreted, are inconclusive". He comments:

> In view of the position taken by the Department of Justice in Brown Shoe, and the perplexing decrees that it negotiated in General Shoe and Hilton, it is small wonder that this controversy persists.

The Handler annual survey ends with a brief but interesting analysis of the Cellophane decision. (*U.S.* v. *du Pont Nemours & Co.*, 24 U.S. Law Week 4344, June, 1956) where by a four-to-three vote the market defense of du Pont was sustained. Pointing out that this was a Section 2, Sherman Act case, Handler takes comfort from the Government's concession that there is an exception from monopoly prosecution "when monopoly power is 'unwittingly' thrust upon a defendant 'by force of accident' as where the "monopoly results simply and solely from a company's skills, abilities and natural advantages". (page 394).

This is a good job of Handler that every antitruster should read. If I have any suggestion, it is that next year perhaps the Association could publish the Handler survey in a June issue of its *Record* rather than delaying it until October. But as usual Handler is worth waiting for, if wait we must.

In the *Virginia Law Review* for October, 1956 (Vol. 42, No. 6, pages 785-800, Charlottesville, Virginia, $1.50 per number) there is a splendid article by Wilkie Bushby, of the New York Bar, entitled "The Unknown Quantity in Probate Antitrust Suits—The Defense of In Pari Delicto." In English this means the right of one corporation guilty of antitrust violations to sue another free from a counterclaim. Mr. Bushby finds the law very confusing as a result of the Supreme Court's denial of certiorari in *Pennsylvania Water and Power Company* v. *Consolidated Gas*, 209 F. 2d 131, Fourth Circuit, 1953, certiorari denied (1954), 347 U.S. 960. Contrary to many of the other cases, the Fourth Circuit allowed the defense. Mr. Bushby quite beautifully summarizes the plight of the poor practicing lawyer in this pretty state of things:

> It is not the purpose of this article to urge that the defense be sustained, rejected, or qualified. On one side is the argument that it is more of a deterrent to persons entering into illegal arrangements to deny recovery to anyone participating in them. This philosophy was expressed by the district court in the Pennsylvania Water & Power case. On the other side is the philosophy expressed by the district court in the Trebuhs and Interborough News cases, that there would be more law enforcement if co-conspirators were allowed to recover from each other.

We can lament with Mr. Bushby that the Attorney General's report does not discuss the matter (page 799) and with him we can hope for congressional clarification (page 799-800) or better yet certiorari of the next case.

ESTATE PLANNING: Volume IX, No. 4, of the *University of Florida Law Review* (Gainesville, Florida, $2.00) is a 187-page symposium on estate planning. Topics covered are "Development and Implementation of an Estate Plan", "Conflict of Laws", "Life Insurance", "Disposition of Business Interests", Dispositive Methods", "Drafting Dispositive Provisions", "Planning for Fiduciary Administration", and "Powers of Appointment". Although some of the problems discussed are illustrated by reference to Florida law, the bulk of the issue is devoted to problems that should be considered by every estate planner.

LEGAL HISTORY: The first issue of a new periodical entitled, *The American Journal of Legal His-*

tory, appeared in January, 1957. This periodical is published by Temple University School of Law in co-operation with the American Society for Legal History. The first issue contained an article on the history of bailments by Professor Samuel Stoljar of the Australian National University, a history of the conflict over the adoption of civil law or common law in the Louisiana Territory in 1804-1812 and a list of the first appointees by George Washington to the federal Bench. In addition, the *Journal* publishes significant documents of American legal history in addition to book reviews. Future articles will deal with various aspects of American and foreign legal history. All lawyers have an interest in history and this publication fills an existing gap in legal literature. The *Journal* may be purchased through Temple University School of Law, 1715 North Broad Street, Philadelphia 22, Pennsylvania. The subscription price is $7.50 per year.

METROPOLITAN PROBLEMS: The February, 1957, issue of the *University of Pennsylvania Law Review* (Vol. 105, No. 4, pages 439-616; price $1.25; address: 34th and Chestnut Sts., Philadelphia 4, Pa.) is devoted to a symposium entitled "Metropolitan Regionalism: Developing Governmental Concepts". The symposium is introduced by Dean Jefferson B. Fordham of the University of Pennsylvania Law School and includes eleven major articles dealing with the various problems confronting the nation's metropolitan areas today. The book has successfully avoided the pitfall into which many symposia are trapped, that of a few outstanding articles supporting several weaker ones. Here, without exception, the articles all measure up to high standards of scholarship and practical usefulness. The articles are organized into four sections: The Metropolitan Region as a Unit, Selected Problem Areas, New Governmental Devices, and Obstacles in Implementing New Devices. The organization of the symposium has obviously been well thought-out in advance, and reveals what must have been painstaking planning on the part of the student editors. Under the first heading, Albert J. Reiss, Jr., the Chairman of Vanderbilt University's Department of Sociology and Anthropology, writes on "The Community and the Corporate Area". Professor Reiss deals with the difficult problem of defining what is the "metropolitan area" or "region" which is to be served by some unified governmental body. Although this is relatively simple in determining the jurisdiction of a single-function agency, it becomes increasingly complex as more and more functions are given to a single agency. Several indices have been used by the social sciences to delimit the "region", such as those based upon newspaper circulation, radio listening areas, commodity trade zones, and so forth, but none of these is perfect for all purposes. Professor Reiss concludes that the Bureau of the Census' Standard Metropolitan Area is probably the best compromise. But any definition which is to be used as a basis of adapting the legal corporate area to the needs of a population having common interests and problems must be flexible, since the ecological community is continuously changing.

It is especially interesting to note that once a working definition of the "region" is established, there remain many problems within the area resulting from the interplay of forces within it. Britton Harris, Project Director of the University of Pennsylvania's Institute for Urban Studies, comments upon this in "The Economic Aspects of the Metropolitan Region". The competition of the several communities within the region for tax revenue, for a desirable population, for the location of industry, etc., is often wasteful and prevents the community as a whole from realizing its potential.

Without co-operation between the larger cities and their suburbs, political solutions seem doomed to ineffectiveness. Winston E. Crouch, Director of U.C.L.A.'s Bureau of Governmental Research and Chairman of its Department of Political Science, writing on "The Government of a Metropolitan Region", illustrates the possible achievements of regional co-operation. Using the Southern California area as an example, he shows how such problems as water supply, sewage, police and fire protection, etc., can be effected either through the transfer of functions to an existing over-all unit such as a county, by the creation of a new general purpose unit, or by the contracting of one community to perform certain functions for other jurisdictions within the region.

Under the second heading, Dr. Mabel Walker, the Executive Director of Tax Institute, Inc., writes on the "Fiscal Aspects of Metropolitan Regional Development". Noting that the traditional source of local government revenue, the property tax, is no longer sufficient to meet today's service demands, Dr. Walker considers the possibilities of local income taxes and inter-governmental service charges for contracted supplying of functions. Probably the most interesting part of the article is the discussion of a highway use tax as a means of discouraging the heavy flow of traffic, much of it non-essential, presently strangling many large urban areas.

John Rannells, Assistant Director of Philadelphia's Urban Traffic and Transportation Board, is also concerned with this problem of increasingly heavy traffic. Writing on "Traffic and Transportation", he notes that the great inter-city super highways have only added to the bottleneck congestion at their termini. He argues particularly for increased effort in providing adequate highway facilities in the central business districts, where the problem is most acute. Since the traffic and transportation problem is basically the result of the modern mobility of the population in going to work and in seeking recreation, it is necessary that mobility be directed by a regional planning of facilities rather

than allowing it to be determined by the "natural" development within each separate small jurisdiction.

This over-all approach is likewise suggested, to meet zoning problems, by Charles M. Haar, a Professor of Law at Harvard, who writes on "Regionalism and Land-Use Planning". The great merit of zoning, the rational and planned allocation of land-uses, is largely lost when decisions are made by independent territorially small jurisdictions. In light of a logical allocation of uses in the region as a whole, the local requirements often seem arbitrary. Professor Haar suggets the possibility of a state reviewing agency which, while allowing the local governing bodies to retain the primary responsibility for zoning themselves, would prevent them from departing too greatly from a more encompassing master plan for the area as a whole.

In the new Governmental Devices section, Victor Jones, Professor of Political Science at the University of California, writing on "The Organization of a Metropolitan Region", looks upon the metropolitan area as a sort of small scale United Nations. He divides the possible means of effectively performing governmental functions on an area-wide basis into two categories. First, there are those which require few if any structural changes: extraterritorial jurisdiction, intergovernmental arrangements and contracts, some annexation, *ad hoc* agencies, metropolitan planning, greater state or federal administration or both, and so forth.

Other possibilities, requiring fundamental changes in structure, include consolidation of independent units, city-county separation, mergers, reorganization of units on a functional level, and federation. Jerome J. Shestack, a Philadelphia attorney and former First Deputy Solicitor of that city, considers more intensively one of these possibilities. Writing on "The Public Authority", he points out several objections to the use of the device which have often been overlooked by those who consider the authority a cure-all for regional problems. Although the authority gained prominence as a more-or-less respectable avoidance of state constitutional debt limitations, it has been advocated as a means of taking certain governmental activity "out of politics" and as a means of securing highly qualified, civic-minded men as administrators. Mr. Shestack suggests that, as to the first point, this may also mean removing the activity from the popular control otherwise thought essential to democratic government (aside from which it has appeared that political considerations have not been entirely absent from authority-appointments) and, if it is necessary to create authorities to encourage qualified men to serve their communities (another untested thesis, by the way), perhaps our first thought should be towards a reappraisal of our general concepts of government. A less theoretical objection is the danger and waste of a multiplicity of relatively independent bodies duplicating functions, if not actually working at cross-purposes with each other and the elected government.

James B. Milner, a Professor of Law at the University of Toronto, considers another of Professor Jones' devices in detail in "The Metropolitan Toronto Plan". The first regional federation in North America, the joining of thirteen formerly autonomous local governments into the Municipality of Metropolitan Toronto for the common performance of such services as schools, borrowing and taxation, health and welfare, water supply, sewage, police and licensing, presents a model—perhaps to be adopted in the light of Toronto's experience—for municipalities in the United States.

In the final section, Obstacles in Implementing New Devices, William Miller, a Professor of Law at New York University, writes on "Metropolitan Regionalism: Legal and Constitutional Problems". Primary among these are state constitutional limitations on the power to delegate taxing and borrowing powers and the requirement in many states that, for any change in existing jurisdictions, the approval of a majority of the voters in each jurisdiction must be obtained—thus allowing one ultra-independent jurisdiction to block the progress of the entire region. Very interesting here are Mr. Miller's observations on the developing legal theory which would allow the state constitutional barriers to be overcome as a result of the higher obligations imposed by congressional approval of interstate compacts.

Concluding the section and the symposium, Lennox L. Moak, Director of the Philadelphia Bureau of Municipal Research and the Eastern Division of the Pennsylvania Economy League, writes on "Some Practical Obstacles in Modifying Governmental Structure to Meet Metropolitan Problems". Too often the high-level planners overlook the what-may-be-decisive factors such as the inbred desire to keep popular control at a local level, the opposition of local job-holders (who, after all, are eating regularly now and don't relish fighting the wolf from the door for the glory of the Greater Community), the desire to keep the local area's "place-in-the-sun," apathy in general, the difficulty of even communicating Regional problems to Local people, and, not without great significance, "just plain cussedness." All-in-all, this is a symposium which should find its way into the hands of everyone—lawyers, city-planners, social scientists and ordinary interested laymen—concerned with the solution of the vexing problems with which so many metropolitan areas are today occupied.

Atomic Energy and the Practicing Lawyer

(Continued from page 692)

the preservation and sterilization of foods and drugs; in measurement and testing of materials and products; in improving processes and products; in detection processes; and in creating new forms of materials. Many businesses will find that radiation applications have immediate economic potential for them. Others will find that research and development efforts are necessary.

The above discussion provides some indication of the scope of the atomic energy industry and illustrates some of the areas of opportunity. It indicates also that atomic energy interest may cut across many varied industries of today which will either serve in or benefit from the development of the civilian applications of atomic energy.

Atomic Energy . . . *A Broad Impact*

The lawyer must recognize that such diverse companies as those engaged in the clothing, drug, aircraft, horticultural, refrigeration, petroleum and metallurgy industries—just to mention a few—have a vital stake right now in atomic energy developments, and that growth of that atomic energy industry has created and will create special and unique problems for such other groups as labor unions and financial institutions, not to mention the legal profession itself. Recognizing this, the practicing lawyer cannot afford to be complacent, apathetic, or oblivious concerning atomic energy matters.

What more should the lawyer know to be able to assist his groping client who senses that atomic energy opportunity is passing him by, but doesn't quite know how to catch the bus? The important facts to bear in mind are these:

(1) The uninitiated company has a substantial handicap to overcome because many of its competitors, usually the larger ones, have probably been working on atomic energy matters for at least a few years, having had the opportunity of AEC contract work. This handicap should not be too discouraging. The atomic energy industry is still in its infancy, and a great future is assured. There is an almost infinite capacity for expansion, and there is still plenty of room for intelligent and aggressive newcomers. This is the time for them to come in, before the handicap grows more severe.

(2) The atomic energy industry is today seething with intense activity. Much of this activity represents planning and hoping rather than actual buying and selling. Private demand for atomic energy materials and services (other than personnel) is not substantial, and in those areas in which demand exists at the present time there appears to be an ample, if not excessive, supply to match the demand. Thus, it is rather difficult to find immediate profit in atomic energy today. Real profit-making in the industry must await the crossing of an economic threshold which will come when technological advance brings the costs of atomic energy applications within a competitive range. When this threshold is crossed, there will be a tremendous torrent of production and construction. Those firms who wish to be a part of this torrent must prepare themselves now through some present financial commitments without expectation of immediate profit.

(3) Few companies not already in the industry are presently equipped to become a part of the new atomic energy industry. A considerable amount of additional and specialized "know-how" will probably be necessary. Perhaps this may require the hiring of additional specialized personnel. And, in many cases, research, development and experimental work may be necessary, some of which may require capital outlays for new equipment. The important thing, however, is that companies which see a place for themselves in the atomic energy industry commence studying the field and its opportunities as soon as possible.

Vast amounts of technological information are readily available in the public literature, and excellent bibliographies are available to assist in finding those published materials which are of particular interest to the company in terms of its own resources and interests. More likely than not, however, a company will not be able to get the full, or an adequate, picture of the opportunities and problems before it in the atomic energy industry merely through a study of the unclassified literature. Many areas of information of direct or tangential pertinence to the company's technological interest, or of importance in its assessment of the economics of the situation, lie behind a curtain of secrecy imposed for reasons of national security.

But this body of classified information is readily available to companies which want it, and this is a fact which lawyers should stress to their clients. The AEC has initiated a unique program for sharing classified information useful in the civilian applications of atomic energy with American industry. Under this "Access Permit Program", an American company may have access to all information classified "confidential" bearing upon the civilian applications of atomic energy upon filing with the AEC an application establishing that such information is "of potential use or application" in its business. Access to "secret" information is similarly available upon a showing that the applicant "has a need for such data" in his business. Once such an access permit is granted, each individual who will have access must file a personnel security questionnaire, undergo a security investigation and be granted an AEC security clearance as a prerequisite to his actually receiving access. Information made available under the Access Permit Program must, of course, be protected in accordance with security regulations.

This may impress some as involving a good deal of trouble and red tape, but it must be emphasized that this procedure is the direct gateway to atomic energy opportunity. In the two years since the program was instituted, well over 1,000 companies and individuals have obtained

access permits. Unquestionably, there are many times that number who could profit greatly by doing so. Indeed, lawyers who find the atomic energy field intriguing might well consider the desirability of themselves becoming access permittees.

(4) If, after adequate study of the atomic energy technology, a company believes that a research and development program is necessary before it can jump into the market place, there may be means available for its undertaking such programs with a minimum of cost and risk. Under the Atomic Energy Act, the AEC has an affirmative responsibility to encourage and support research and development programs. If, therefore, a company can persuade the AEC that it is capable of performing research and development work towards a goal which the AEC believes to be desirable in furthering the atomic energy program, it may be possible to conduct such research and development work under an AEC contract. This is not an unmixed blessing, however, since such a course of action would jeopardize the company's patent position with respect to inventions or discoveries connected with such work.

An alternative arrangement might be a co-operative research and development effort with one or more other companies, where the companies each have a different interest which might all be served by a common program. Thus, an electric utility, a drug manufacturer, a metallurgical company, and an oil refiner could probably all use a single reactor for productive research and development work without embarrassing competition among themselves.

(5) When the company is prepared to enter the market place, it may do so, of course, as a "rugged individualist" without reliance upon Government support. But for those companies of a more timid nature, there exist opportunities for relationships with the AEC which will minimize their risks and costs. Lawyers should be able to explain these opportunities to their clients since knowledge of the specific opportunities available or of the type of opportunity which may become available, may, in fact, shape the company's entire approach to entering the industry.

The AEC, directly or through its contractors and subcontractors, is presently the principal purchaser of atomic energy products and services. A company may want to "get its feet wet" in the atomic energy industry by seeking AEC contracts and subcontracts, especially in this time before there is a substantial demand from private industry. Again, however, it should be aware that a desired patent position may be adversely affected by this course of action.

Other opportunities are provided by the AEC's program for encouraging private enterprise to assume functions essential to a private atomic energy industry which hitherto have been exclusively or primarily performed by the AEC. For example, the AEC offered to purchase from private industry five years' output of zirconium, as an inducement for private companies to commence production of this material on an enterprise basis. Similar programs have been announced for other materials. Along the same line, the AEC has offered to purchase uranium feed materials from private companies for use in AEC production facilities, and to use the services of private companies to a limited extent for the chemical reprocessing of irradiated fuel elements removed from AEC reactors. Many like opportunities may become available in the future. Also, it is not unlikely that an enterprising company might be able to purchase certain facilities now owned by the AEC and operate them itself, as a step toward replacing AEC activities by private enterprise. Indeed, a company with ingenuity, will, and resources should not find it too difficult to carve out its own niche in the industry and "sell" the AEC on the idea of turning the niche over to private enterprise.

All of these matters should be of direct concern and interest to the lawyer who has clients who may have an interest in atomic energy activities. The lawyer should be able to impart to his clients information concerning the legal and institutional structure of the industry and the framework of opportunity which it affords. The above discussion does not and cannot tell the entire story, but perhaps it provides sufficient information to enable the lawyer to judge for himself whether atomic energy developments have sufficient meaning for his own practice to cause him to look into the matter more extensively.

The atomic energy industry and its legal framework are becoming increasingly more conventional. Numerous tools of specific interest to the legal profession are available to assist the lawyer in acquiring some mastery of the field. Many articles on atomic energy law are now appearing in our legal periodicals; bar association groups are working intensively on atomic energy problems; a loose-leaf atomic energy law reporter designed specifically for lawyers is available; and one major American law school, the University of Michigan, is engaged in a very large scale program in the field of atomic energy law, and has issued numerous publications which will be of interest to practicing lawyers, including one booklet on "Atomic Energy Technology for Lawyers." But, despite these aids, there can be no escaping the fact that the atomic energy field is, from the lawyer's standpoint, extremely complex. While few lawyers can expect to become experts in either the law or technology of atomic energy, they can perform an important function in at least helping their clients to understand where their atomic energy opportunities may lie, and how their clients should go about seeking out these opportunities.

Selection of Federal Judges

(Continued from page 688)

preme Court was a personal appointment of the President and that if the help of the Committee was needed, it would be consulted.

When the next vacancy occurred, the Committee was not consulted but the Chairman of the Committee was invited by the Deputy Attorney General to testify before the Senate Committee in favor of the confirmation of Judge Harlan.

Deputy Attorney General Rogers, speaking in Baltimore before the Regional Meeting of the Association in October, 1956, said that when Mr. Justice Brennan's name was discussed with the President, he asked what the American Bar Association Committee thought about him. When he was told that the Committee had not been asked for its opinion, he directed that the nomination be held up until the Committee could report.

It is gratifying to think that the Committee has become so useful in such a short time. It can become even more useful with the full and fearless co-operation of the Bar.

I have tried to set down factually and objectively the method of selecting federal judges as I have seen it work under two national administrations. The story is of conditions as they are, not as they should be. This is also true of the way in which the Committee works, although I happen to think that the way in which the Committee is functioning is the best way it can under existing circumstances.

A hundred years from now anyone who casually reads the current articles on the problem of selecting judges may easily obtain an entirely erroneous view of the quality of our present federal judges. I have been vitally interested over the last twenty years in searching for the best method of selecting judges. I have done my fair share of complaining about judges who are considerably less than ideal, so I think it is only fair to say that during my six years of service on the Committee, on balance, the quality of the appointees has been above average. During my last two years on the Committee, sixty-six judges were appointed. Many more names were considered by the Committee who were never nominated but of those appointed, few were of inferior caliber and, in my opinion, the overwhelming majority of them were fine appointments.

Chief Justice Vanderbilt in his book *The Challenge of Law Reform* defines the desirable attributes of a judge as follows (page 11):

> We need judges learned in the law, not merely the law in books but, something far more difficult to acquire, the law as applied in action in the courtroom; judges deeply versed in the mysteries of human nature and adept in the discovery of the truth in the discordant testimony of fallible human beings; judges beholden to no man, independent and honest and—equally important—believed by all men to be independent and honest; judges, above all, fired with consuming zeal to mete out justice according to law to every man, woman and child that may come before them and to preserve individual freedom against any aggression of government; judges with the humility born of wisdom, patient and untiring in the search for truth and keenly conscious of the evils arising in a workaday world from any unnecessary delay.

Judges who meet these specifications are not easily found but that is no reason why anyone need ever fear that the Committee will lower its standards. It has made a good start. Its initial steps seem to have been in the right direction.

Because the Committee has no official status its position must always remain vulnerable. Its ability to co-operate with the Attorney General and with the Senate Committee on the Judiciary may change as the individuals holding those offices and the personnel of the Committee change. The only way in which the Committee can retain and increase its influence in the selection of properly qualified federal judges is to make its services to the Attorney General and to the Senate invaluable. This it can do by unselfish service, performed willingly, objectively and with unquestioned integrity. The Committee has no other ambition. Happily this is its principal function.

The Butler Amendment

(Continued from page 717)

ity to tolerate, if not accept, novel social, political and economic ideas long after they had reached the age of seventy-five, while others had apparently lost that capacity many years before that age. Thus, when Justice Holmes resigned at the age of ninety-one and Justice Brandeis retired at the age of eighty-three, they were more tolerant of social, economic or political innovations by the legislatures (national or state) than were Justice McReynolds at fifty-two and Justice Sutherland at sixty, the ages at which they were appointed to the Court. Lest it be argued that Holmes and Brandeis were exceptions to a general rule of judicial intolerance, it should also be noted that the same sort of tolerance or judicial self-restraint characterized much of the decision-making of the Supreme Court under Chief Justices Taney, Waite, Stone and Vinson.

It appears very likely that the basic philosophical attitude of individual Justices toward the nature of the judicial process is of far greater importance than physical age in determining the extent to which justices will remain ideologically flexible when faced with strikingly new constitutional problems. Moreover it would seem that the appointing authority, particularly the President, is a factor which is much more important than age in determining the ideological attitude of the Court in a given historical period. For Presidents, from the very beginning of the present constitutional system, have consistently attempted to select nominees for the Supreme Court who shared their own general social, political and economic attitudes.

Presidents have admitted this with varying degrees of subtlety. Thus President Washington referred to the necessity for sound appointments as "essential to the happiness of our

country and the stability of its political system".[35] After his election defeat by Thomas Jefferson, President John Adams wrote bluntly that "In the future administration of our country, the firmest security we can have against visionary schemes and fluctuating theories will be in a solid judiciary. . . ."[36] Jefferson was similarly blunt when he suggested that his successor, President Madison, replace Federalist Justice Cushing with "a firm unequivocal republican, whose principles are born with him, and not an occasional ingraftment, as necessary to complete the great reformation in our government to which the nation gave its fiat ten years ago".[37] And President Theodore Roosevelt wrote frankly to Senator Lodge concerning the possible nomination of state judge Oliver Wendell Holmes: "I should hold myself guilty of irreparable wrong to the nation if I should [appoint] any man who was not absolutely sane and sound on the great national policies for which we stand in public life."[38] Presidents have, of course, been sorely disappointed by particular decisions of their appointees (*e.g.*, President Theodore Roosevelt's reaction to Justice Holmes' position in the *Northern Securities Case*). It is true, nevertheless, that most Presidents have been successful in choosing appointees to the Supreme Court who reflected, generally speaking, their social, political, economic and philosophical outlook.

Retirement at 75 . . . *A Loss of Services?*

From the foregoing, it would appear that the two assumptions upon which the compulsory retirement provision is based are open to considerable question on scientific and historical grounds. It thus seems possible that by arbitrarily cutting off the services of Justices at seventy-five, this provision risks the loss of the services of men of broad vision without any real assurance that its claimed beneficial effects can be realized. It is, of course, recognized that some may feel that it would be better to risk the loss of Justices of broad vision than to suffer the decision-making of Justices like Field and Grier who continued to serve on the Bench after they had become senile.[39] But the problem which might arise because of the loss of experienced members of the Court could become acute, particularly if one takes into account the average age at which Justices are appointed.[40]

The average appointment age of members of the Supreme Court has risen steadily from forty-seven and one-half in the early years of the Republic to fifty-seven years in the first third of the twentieth century.[41] Compulsory retirement at age seventy-five would have seriously curtailed the period of fruitful service of Justices like Holmes, Cardozo, Brandeis and Hughes (second appointment) who were sexagenarians at the time of their appointments.[42] Considered in conjunction with the doubtful validity of the assumptions upon which the compulsory retirement proposal is based, curtailment of the valuable services of eminent Justices seems unwarranted.

Appellate Jurisdiction . . . *Is a Change Wise?*

The third provision of the Butler Amendment, which pertains to the Supreme Court's appellate jurisdiction, is undoubtedly one of the most important, in terms of constitutional significance, of the four originally proposed. Supporters of this provision claimed that it was designed to prevent a repetition of the congressional action which preceded the *McCardle* decision of the post-Civil-War era. In that period Congress, under its power to "make exceptions" to the Supreme Court's appellate jurisdiction,[43] stripped the Court of a portion of its appellate jurisdiction in order to prevent consideration of the constitutionality of the controversial Reconstruction Act.[44] Proponents of the Butler Amendment could have devised a method of preventing repetition of such congressional action simply by proposing an amendment forbidding congressional curtailment of the Supreme Court's appellate jurisdiction in areas in which a suit of constitutional significance was pending in a lower federal or state court. However, section three of the Butler Amendment is potentially much more comprehensive, for by forbidding any congressional alteration of the appellate jurisdiction of the Court in constitutional cases, the way is opened for serious judicial abuse of power. Secondly, it should also be noted that a substantial number of constitutional issues fall within the original jurisdiction of the Supreme Court which is not subject to congressional manipulation. This raises the question whether section three of the Butler Amendment is necessary.

The history of the Supreme Court

35. Quoted by Charles Warren in THE SUPREME COURT IN UNITED STATES HISTORY, 31-32.
36. *Ibid.*, page 172.
37. *Ibid.*, page 404, note 1.
38. Quoted in Burns and Peltason, GOVERNMENT BY THE PEOPLE, page 583; for an interesting special study see Daniel R. McHargue, "President Taft's Appointments to the Supreme Court", 12 JOURNAL OF POLITICS, pages 478-510.
39. Charles Fairman, MR. JUSTICE MILLER AND THE SUPREME COURT, pages 393-397.
40. A factor not considered by advocates of the amendment at the Senate subcommittee hearing.
41. Cortez A. M. Ewing, THE JUDGES OF THE SUPREME COURT, 1789-1937, pages 64-76.
42. Currently, if such an amendment were in force, Chief Justice Warren's service on the Court would be cut off on March 19, 1966; WASHINGTON POST, (April 13, 1954), page 13.
43. Article III, Section 2.
44. Act of March 27, 1868, 14 Stat. 44.

shows that while judicial abuse of power may differ in kind from executive and legislative abuse, it has on occasion been a very serious problem in the development of the American constitutional system. The judicial process of interpretation is not mechanical. It permits some choice of alternatives in decision-making. Abuse of judicial power generally takes the form of dogmatic subjectivity in the interpretative process. In terms of American constitutional law, a characteristic manifestation of such subjectivity was the process whereby Justices, consciously or subconsciously, engrafted upon the Constitution doctrines which supported their individual social, economic or political beliefs. The propensity of many Justices in the period 1888-1937 rigidly to enforce essentially subjective social and economic doctrines which had been long rejected by the majority of the people of the nation (or of a particular state) created a number of serious constitutional crises, the last of which led to the court reorganization controversy of 1937.[45]

It may be argued that since 1937, the Supreme Court has demonstrated self-restraint in the interpretative process sufficient to justify the belief that judicial abuse of power is a thing of the past. Yet it should be noted that while the contemporary Court has demonstrated admirable self-restraint, it has not denied to itself its crucial substantive due process powers. Outside of the area of civil liberties, these powers have lain virtually dormant since 1937, but they remain available should a change of heart or of membership transform the interpretative philosophy of the Court. In this respect, it may be remembered that the decades of self-restraint which characterized the Supreme Court under Chief Justices Roger B. Taney and Morrison R. Waite were followed by over a half century of abandonment of such self-restraint.[46]

In the event that a majority of Justices revert to dogmatic and subjective decision-making or decide to broaden appreciably the scope of the Court's authority under its discretionary power to review lower Court decisions involving matters of public interest, other serious constitutional crises could result.[47] Such crises could arise either because dogmatically subjective doctrines thwarted the constitutionally legitimate desires of a majority of the nation's people, or because the Court's action in broadening the scope of its reviewing authority delayed indefinitely the handing down of decisions in important constitutional cases. Yet Congress, under the Butler Amendment, would be rendered virtually impotent. By excluding congressional alteration of the Supreme Court's appellate jurisdiction in constitutional cases, this amendment would remove a potentially effective legislative check on judicial abuse of power.[48]

In the section of the Butler Amendment making members of the Court ineligible for the Presidency or Vice Presidency until five years after the termination of service on the Bench, as in other sections of the amendment, the supporters of this constitutional revision are strong in historical facts, but weak on the interpretation given such facts. From time to time members of the Supreme Court have had presidential aspirations or have been considered by party leaders as strong potential candidates. One careful study of the problem, dealing with the period 1862-1890, indicated that no less than four members of the Court were at one period or another seriously considered as possible candidates.[49] Charles Evans Hughes resigned as Associate Justice in order to run against Woodrow Wilson in 1916. And in recent years, Chief Justice Earl Warren and Justice William O. Douglas have been discussed, over their objections, as possible presidential candidates. However, such involvement in political affairs, whether sought or unsought, does not establish that members of the Supreme Court have colored their judicial decisions in order to further their political ambitions.

Supporters of the Butler Amendment did not make such a direct charge, but endeavored to establish it by implication. As Leonard D. Adkins put it, in a prepared statement before the Senate subcommittee,

> It cannot be denied that Justices of the Supreme Court are susceptible to personal ambition, as are other men, and that the possibility of election to high office may color the thinking and the decisions of an ambitious Justice.[50]

No evidence was produced which proved that Justices have modified decisions in order to further their political ambitions. Nor could such evidence be produced. For the essentially subjective elements which enter into the interpretative process render positive inquiry into the motives of individual Justices an extremely hazardous undertaking. Consequently, the portion of the

---

45. *Supra*, page 7, note 18.

46. But not under Chief Justice Salmon P. Chase.

47. Under the Butler Amendment, it would be possible for a majority of Justices opposed to the exercise of quasi-judicial functions by administrative tribunals to establish and apply a doctrine whereby the Supreme Court would undertake to review not only the legal but the factual findings of such tribunals, but Congress would be powerless to intervene.

48. Congress could, of course, still strip the Supreme Court of the discretionary authority afforded it when the writ of error was replaced by the more flexible writ of certiorari, but such action would aggravate rather than ameliorate a constitutional crisis.

49. Chief Justice Chase and Justices Davis, Field and Miller; Charles Fairman, *Mr. Justice Miller and the Supreme Court*, pages 293-306.

50. *Hearing*, *op. cit.*, page 31.

Butler Amendment relating to the eligibility of members of the Supreme Court for the Presidency or Vice Presidency is based pretty largely upon an unproved assumption. In the light of the doubtful validity of this assumption, it is open to serious question whether the occasional appointment of a man like Chief Justice Chase, who either nourished or was suspected of nourishing presidential ambitions, is so serious an evil as to warrant putting into motion the ponderous machinery of the amending process. Moreover, it well might be that since Charles Evans Hughes' unsuccessful candidacy in 1916, custom has already taken care of this problem.

In addition to the analysis of the particular sections of the Butler Amendment given above, attention should be given to some of the basic assumptions of its framers concerning the amendment in its entirety. The assumption of advocates that this amendment would strengthen the constitutional principle of checks and balances is flatly contradicted by two of the four original portions of the amendment. As was noted above, the amendment permits judicial abuse of power by removing two important judicial restraints, *i.e.*, congressional authority to alter the size of the Supreme Court and congressional power to make "exceptions" to the Supreme Court's appellate jurisdiction.

Rigid insistence upon formal constitutional amendment as the means to provide virtually complete judicial independence overlooks the fact that formal amendment may be unnecessary and, in certain situations, undesirable. The British judicial system may be taken as a model of judicial impartiality, effective in operation and free from political pressures from any quarter. But British judges are not provided the safeguards regarding tenure and remuneration which members of the regular federal judicial system enjoy. Their salaries may be altered by ordinary legislation and they may be removed by the legislature. Nevertheless, British judicial independence has become firmly entrenched as a convention or unwritten constitutional understanding. Similar conventions or understandings exist and have been cherished in the American constitutional system. For example, the defeat of the court reorganization proposal of 1937 may well attest to the existence of a constitutional understanding prohibiting the manipulation of the size of the Court to influence future decisions.

The attempt by the advocates of the Butler Amendment to make impregnable the Supreme Court's authority to render unconstitutional the acts of the legislature and the actions of the executive presupposes the unchallenged efficacy of judicial review. It is not the purpose of this study to restate at length the pertinent observations of such eminent students of government and history as James Bradley Thayer and Henry Steele Commager,[51] but it should be noted that serious problems have arisen from the undemocratic nature of this judicial power. For example, Thayer's statement that "the tendency of a common and easy resort to this great function (judicial review) . . . is to dwarf the political capacity of the people and to deaden its sense of moral responsibility"[52] has as much relevance to problems of civil liberty today as it had to questions of economic regulation at the turn of the century.

Two general approaches to the question of the desirability of the Butler Amendment deserve consideration. First, it might be argued with validity that the history of the Supreme Court indicates not only the growth of judicial power, but also the steady growth of public acceptance of the exercise of the power of judicial review. Therefore, the dangers which the supporters of the Butler Amendment seek to guard against are chiefly of historical interest and so far as the future is concerned largely imaginary. Unwritten constitutional understandings probably would effectively prevent interference with judicial independence and yet retain constitutional flexibility.

A second approach would concede to the advocates of the amendment the possibility of future danger to judicial independence. Here the question would be whether the proposed amendment creates more difficulties than it prevents. The detailed analysis of this proposal which comprises the major portion of this study indicates that an affirmative answer is in order.

The Butler Amendment is of the same genus as the Bricker Amendment and the multitude of lesser known amendments which have come before Congress in the last few years. It may justifiably be classified with those proposals for formal alteration of the fundamental law which would tend to make our present relatively flexible Constitution a rigid, detailed code, and which would curtail drastically the area left to the control of legislative pluralities and majorities. This classification in itself raises serious doubts concerning the amendment's desirability. In short, the Butler Amendment, by attempting uncertainly to meet the unlikely danger of legislative or executive interference with judicial independence, would probably create new constitutional problems more serious than those which it seeks to solve.

51. See JOHN MARSHALL and MAJORITY RULE AND MINORITY RIGHTS, respectively.
52. JOHN MARSHALL, pages 104-110.

(*Continued from page 696*)

and counsel for a long period, it will be found that courts generally recognize the desirability if not the necessity, of requiring the pleader to establish in the complaint a statement of sufficient facts regarding a causal connection between the wrong and the damage, so as to enable the defendant to be apprised of the legal theory which will be urged at the trial of the case and thus be able to frame responsive pleadings thereto.

Following the above quotations, Mr. Ilsen makes this statement on page 194:

> While depositions are well suited for use in obtaining necessary evidence after answer, there seems no adequate reason to substitute their use where the simpler, quicker and decidedly less expensive motion for a more definite statement is needed. Attorneys who have used the deposition proceedings can well testify to their expense. If knowledge now obtainable under rule 12 (e) would have to be obtained by deposition in complicated actions such as anti-trust suits, etc., the cost might well be prohibitive.

A complaint should not be considered merely as a vehicle for haling a defendant into court under averments so general in nature that plaintiff, by the Rules, may shift practically the entire burden of both proof and disproof to a defendant. With certain exceptions, principally under the second category of cases herein considered, a requirement that the plaintiff set forth concisely the facts upon which he asserts his claim not only would afford the defendant notice of the claim he has to answer and then meet but it also would furnish the court, *ab initio*, with a practical knowledge of the rights of the plaintiff and the defendant in the use of the procedure provided for in Rules 26 to 36.

Certainly none of us desire a return of the technical pleading and special pleas of the common law, nor do we expect them ever to return; but the common law practice of averring the essential facts *under oath* and *not over the mere signature of counsel* not only imposed a proper burden on a plaintiff but continues to be just as practical and realistic today. This is especially true in private party suits included in our first category. With a definite answer filed to a specific complaint, the court should then have before it the real issues of fact which are actually involved. The court, with these issues before it, is in a position to control and impose reasonable restraints in the use of the procedure provided for in Rules 26 to 36, inclusive. As a practical matter, the courts, so informed at the earliest possible date in the course of litigation, certainly are in a better position to resolve promptly questions involving the propriety of depositions, interrogatories, discovery and requests for admissions.

Thus, it seems to me that with such informative pleadings much of the unnecessary cost of litigation and wasted time could be avoided. The courts by strict interpretations of the adequacy of the pleadings and by their decisions determining the fair and proper use of these particular Rules, as determined by the factual issues involved, would not only save litigants' time and expense but considerable time of the courts. It is a well recognized fact that when questions are raised concerning the propriety of interrogatories or of applications for discovery or requests for admissions under the present Rules, considerable time is devoted for instance in arguments or in conferences to questions of relevancy or materiality. Because of general averments and the attitude of resolving doubts in favor of the plaintiff, the courts, in too many cases, are required to devote unnecessary time in attempting to learn what should already appear from the pleadings. In so many instances the court, left in the dark or misled by general statements, and resolving the doubts in favor of the plaintiff, will permit costly procedure which otherwise it might have been able to prevent.

The cases in this first category represent by far the greater bulk of civil cases in our federal courts. Negligence cases arising out of automobile accidents alone increased nationally 275 per cent over a period of twelve years ending in 1953. Personal injury actions by railroad employees under the Federal Employers' Liability Act increased 1216 per cent.[7] In a spot check of a current trial list ninety-two out of 125 cases are negligence suits and, therefore, come within our first category. With the issues of fact determined initially between parties who know, or who then should know, the facts, a large part of the costly by-play in such cases could be eliminated. Why in these cases should a moving party be able through general averments to have the defendant lay out on the table information and circumstances from which he (the moving party) is able to select and then adopt any facts or circumstances which *perchance* may give better support to the claim which he has alleged generally? Such procedures are bound to work an injustice, particularly in suits where there never was any merit to the claim alleged. It seems to me that we have lost sight of the simple fact that a specific and precise statement of a claim *properly sworn to by the party responsible*

7. *Current Trends in the Business of the Federal District Courts*, 7 VANDERBILT L. REV. 668, 672 (June, 1954).

for the allegations and constituting a good cause of action should continue to be an essential and vital part of a lawsuit.

However, in order to carry out the real intent of the Rules (with which intent undoubtedly most of us are in accord), a different approach in stating a complaint would be necessary in suits included in our second category and probably, where unusual circumstances are involved, in a very few cases included in our first category. In class actions, derivative suits and actions to recover treble damages, in antitrust, patent and conspiracy litigation, plaintiffs presumably know when they have been injured and in a general way the cause of their injuries. Nevertheless, seldom are they in a position to aver specific facts although where the Government is the moving party, particularly in antitrust suits, it secures specific details in many cases through grand jury investigations. Undoubtedly all of us agree that under such circumstances it would not be fair or just to permit a defendant to conceal evidence completely under the defendant's control and to which the plaintiff has no means of access.

With respect to cases in this category and in keeping with what has been said with respect to cases in the first category, provision could be made whereby the plaintiff would be required to aver in his original complaint concisely what he actually knows and what he believes generally to be the relevant facts, including, of course, a statement of consequential injuries. Upon the filing of such a complaint, further provision could be made permitting the plaintiff to proceed with the proper implements of discovery provided for in the Rules, with leave to file a more specific complaint within a time limit or limits fixed by the court. Upon the filing of such amendments or supplements setting forth specific facts upon which the plaintiff relies, the defendant and the court, as has been stated with reference to cases in the first category, are properly informed of plaintiff's claim. Then when the final answer has been filed and the fact issues are before the court, the court and the parties to the action from there on are able to prepare for and plan trial procedure intelligently and within reasonable limitations.

From all that has been said and written about lengthy antitrust litigation and similar actions, there can be no question but what there is a crying need for a prompt and thorough study of the problems involved and probably for appropriate legislative action. As Judges Medina and Wyzanski, along with others having had the same experiences in such cases, have said in effect: No single mind is capable of assimilating, analyzing and comprehending all the factual material consisting of countless exhibits, depositions, answers to interrogatories numbering in the hundreds, and thousands of pages of testimony. No one could say correctly that the Civil Rules are responsible for these problems, but it seems apparent that they have aggravated rather than alleviated unjustified expense, research, and waste of time. With the uncertainties which arise under general averments, the courts are at a loss to properly safeguard defendants in these respects and, in many instances, the plaintiffs themselves.

In conclusion, it seems obvious that some corrective measures are definitely in order. I wish to emphasize my sincere belief that factual issues should be determined at the beginning of the litigation and not after all the doors of inquiry have been thrown open, the court swamped with documents, records and almost endless arguments, and counsel for the parties wandering helplessly and without compass through a forest of details. Primary burdens should be returned, to some extent at least, to the moving parties. Defendants are entitled to know in advance from allegations made under oath what they have to meet; and the courts, as umpires attempting to protect the rights of all parties, should be in a position to see the plate as well as the ball.

With respect to suits in the second category, such as antitrust and conspiracy actions, it seems to me that legislative action is necessary in order to place reasonable and uniform limitations on both factual material and *the period of time to be covered* by the evidence. Parties to a suit probably would be more careful in requiring opponents to go to great expense in an extensive research through almost endless records if such expenses could be taxed as a part of the costs with some discretion in the court as to their ultimate payment. Unless some such measures are taken, justice, the object of all litigation, will continue in too many cases to be concealed under a mass of detail.

Classified

RATES 20 *cents per word for each insertion; minimum charge of* $2.00 **payable in advance.** *Copy should reach us by the first day of the month preceding month of issue. Allow two extra words for box number. Address all replies to blind ads in care of* AMERICAN BAR ASSOCIATION JOURNAL, *1155 East 60th Street, Chicago 37, Illinois.*

BOOKS

THOMAS LAW BOOK COMPANY PUBLISHers. We Sell, Buy and Exchange, Incorporated 1885. St. Louis 2, Mo.

LAW LIBRARIES OR LESSER COLLECtions of esteemed used law books purchased. Our 64-page printed catalog free on request lists some used law books we have for sale, also indicates the type of materials we will purchase. CLAITOR'S BOOK STORE, Baton Rouge 2, Louisiana.

UNITED STATES GOVERNMENT PUBLIcations at regular Government prices. No deposit—Immediate Service—Write NATIONAL LAW BOOK COMPANY, 1110 13th St., N. W., Washington, D. C.

LAW BOOKS BOUGHT AND SOLD: COMplete libraries and single sets. CLARK BOARDMAN CO., LTD., 11 Park Place, New York City.

"THE HAND OF HAUPTMANN," STORY of Lindbergh Case by Document Expert cited by John Henry Wigmore, 368 pages, 250 Illustrations. Price $5.00. J. V. HARING & J. H. HARING, 15 Park Row, New York 38, N. Y.

FOR A PROMPT CASH OFFER ON LAW books, write The Michie Company, Charlottesville, Virginia.

LAW BOOKS BOUGHT, SOLD, EXchanged. Free Catalogue. IRVING KOTHS, 516½ Main St., Vancouver, Washington.

WHEN YOU HAVE A DOCUMENT PROBlem of any kind send for "Questioned Documents, Second Edition." 736 pages, 340 Illustrations, $12.50 delivered. Also "The Problem of Proof", 539 pages, $10.50 delivered. ALBERT S. OSBORN, 233 Broadway, New York 7, N. Y.

LAW BOOKS BOUGHT AND SOLD: COMplete libraries and single sets. CECIL SKIPWITH, 108 East Fourth Street, Los Angeles 13, California.

WRITE US FOR YOUR TEXT BOOK needs. Good used law books bought, sold and exchanged. (In business 50 years.) THE HARRISON COMPANY, 93 Hunter Street, S. W., Atlanta 2, Georgia.

LOWEST PRICES USED LAW BOOKS complete stocks on hand, sets and texts, Law Libraries appraised and bought. NATIONAL LAW LIBRARY APPRAISAL ASSOCIATION, 538 South Dearborn St., Chicago 5, Illinois.

USED LAW BOOKS AT ATTRACTIVE prices. We buy and sell either one book or a complete library. Let us quote you prices. HARRY B. LAKE, 321 Kearney Street, San Francisco 8, California.

LAW BOOKS—WE CAN SUPPLY THE FOLlowing sets at this time: U.S. Attorney General opinions, complete sets and odd volumes—Decisions of the Commissioner of Patents, complete sets or odd volumes—U.S. Code Annotated, American Law Reports complete including Digest. ALSO, the following complete Law Reviews: Notre Dame Lawyer, Marquette Law Review, Yale Law Journal, Harvard Law Review. Write us for your every law book need. DENNIS & CO., INC., 251 Main St., Buffalo 3, New York.

FOR SALE

AMERICAN JURISPRUDENCE, 58 VOLumes and 4 volumes of General Index and Supplements to date. Nichols Cyclopedia of Legal Forms—9 volumes, revised to date. Box 7 AG-2.

SACRIFICE: CORPUS JURIS SECUNDUM. Set like new. Individual. Box 7AG-3.

STATE REPORTS: Arkansas, 1-99; California, 1-130; Colorado, 1-17, 20-21; Connecticut, 1-77; Illinois, 1-401 except 263, 266; Indiana, 1-186; Iowa, 1-188; Kansas, 1-72; Kentucky, 1-166; Minnesota, 1-135; Massachusetts, 1-187; Michigan, 1-144 except 197-203; Missouri, 1-166; Nebraska, 1-60; Nevada, 1-20; New Jersey Equity, 1-68, 70, Law, 1-60; New York, 1-284; North Dakota, 1-73; Ohio, 1-137; Oregon, 1-54; South Carolina 1-18, 26, 80-96 Vermont, 1-62; Tennessee, 1-140 except 123, 132; Pennsylvania, 1-261; Wisconsin, 1-176; U. S., 1-335; also, New York Supplement, 1-300; Second Series Same, 1-113; American Bankruptcy Reports, 1-49; New Series Same with Collier's notes, 1-52; Furber's Digest for same—2 Volumes. Box 7AG-11.

HANDWRITING EXPERTS

HARRY M. ASHTON, 3601 EDWARDS Road, Cincinnati 8, Ohio. Telephone East 1-6704, or Willow 1-3019. Over 30 years with Post Office Department. Qualified in all courts. Completely equipped laboratory for handling all types of document problems. Member American Academy of Forensic Sciences. Listed in Martindale-Hubbell Law Directory.

RICHARD BOWEN—26 YEARS' EXPERIience. Photo and laboratory equipment. 10023 Hubbell Ave., Detroit 27, Mich. VErmont 7-6454.

VERNON FAXON, EXAMINER OF QUESTioned documents. Opinions rendered re: Handwriting, typewriting, erasures, interlineations, substitutions on wills, deeds, contracts, books of account, and all kinds of documents. Suite 1408, 134 North LaSalle Street, Chicago 2, Ill. Telephone: CEntral 6-1050.

E. H. FEARON, BESSEMER BUILDING, Pittsburgh 22, Pa. Office telephone: ATlantic 1-2732; residence telephone: TEnnyson 5-7865. Scientific examination of disputed documents. Completely equipped laboratory. Photographic exhibits including third dimension and color made to demonstrate facts in court. Nationwide experience.

BEN GARCIA, EXAMINER OF QUESTioned handwriting, typewriting and inks. Qualified witness. Years of experience. 805 E. & C. Building, Denver, Colorado. Phone: AComa 2-1729.

LINTON GODOWN, MEMPHIS, EXAMINER handwriting, signatures, typewriting, inks, alterations, etc. Portable laboratory equipment. Reports. Exhibits. Experienced, qualified witness. Member ASQDE. 1830 Exchange Bldg., Jackson 5-1711.

HARRIS & HARRIS, 510 SOUTH SPRING Street, Los Angeles, telephone MAdison 5-1518; and 703 Market Street, San Francisco, telephone DOuglas 2-4329. Discovery and proof of facts relating to disputed handwriting, typewriting, inks and papers. Over 25 years' experience. Qualified in all courts. Members: American Society of Questioned Document Examiners.

LUKE S. MAY, CONSULTING EXPERT & examiner of "Questioned Documents." Qualified all courts United States and Canada. Advanced Scientific Evidence Laboratories for proof of facts, all types disputed papers. Phone Elliott 2445, 843 White-Henry-Stuart Building, Seattle 1, Washington.

M. A. NERNBERG, EXAMINER OF DISputed Documents. Thirty years' experience. Formerly specially employed by the United States Government as handwriting expert in cases involving handwriting. 1728 Grant Building, Pittsburgh, Pa. Phone ATlantic 1-1911.

WM. H. QUAKENBUSH—30 YEARS' EXperience in the disputed document field. Qualified in all courts. Fully equipped laboratory. Listed in Martindale-Hubbell Directory. Phone: VI3-7826 Box 424, Lawrence, Kansas.

KARL SCHOTTLER, 915 CHESTNUT Street, St. Louis 1, Mo., Telephone GArfield 1-3399, Document Examiner and Handwriting Expert; Modern Laboratory; Scientific Technique in Document Examinations.

CHARLES C. SCOTT, KANSAS CITY, MO. Author: *Photographic Evidence.* Handwriting and typewriting identified. Forgeries and alterations detected. Faded and obliterated writing deciphered. Nationwide experienced consultant and expert witness. Commerce Trust Building, VIctor 2-8540.

DR. WILMER SOUDER, CONSULTANT. Reports. Exhibits. Testimony. 30 years' experience in State and Federal Courts while a career member Scientific Staff, National Bureau of Standards. 3503 Morrison St., N. W., Washington 15, D. C. Phone: WOodley 6-3050.

GEORGE G. SWETT, DOCUMENT EXPERT with Post Office Department 12 years. Handwriting, typewriting and other document problems considered. Photographic laboratory maintained. Nation-wide qualification. Member: ASQDE. 14 South Central, St. Louis 5, Mo. PArkview 5-9394.

HERBERT J. WALTER, EXAMINER AND photographer of Questioned Documents, 40 years' experience. Charter member ASQDE, George B. Walter, Linton Godown, Associates. Phone: CEntral 6-5186, 100 North LaSalle Street, Chicago 2.

LAWYERS WANTED

FINE OPPORTUNITY AVAILABLE WITH outstanding firm in large Ohio city. Qualifications: five to ten years' experience in the trial of civil actions in State and Federal courts. Please send detailed summary, including age, education, experience and marital status, all of which will be treated as confidential. Reply Box 7JN-1.

YOUNG LAWYER AS ASSISTANT IN handling trade-mark matters in corporate law department. Position with established corporation having numerous diversified products. Work includes all phases of trade-mark law and practice. Prefer applicant with one to three years' experience in U. S. or foreign practice. State age, education, previous employment, family status, and salary desired. Please write fully. Salary commensurate with age, experience, and ability. All replies will be held in strict confidence. Box 7AG-7.

Bar Activities

(Continued from page 754)

cited article thereby provoked and written by Mr. Shipley, which consists of an excellent defense of the contingent fee arrangement. Mr. Shipley well points out that the court rendering the condemnation did not even mention how the lawyer who loses his contingent fee case will be paid. Also that no one attempts to regulate the doctors' or the architects' fees, and that their fees are fixed in proportion to the value of the services rendered. He then aptly comments that it is not unfair for lawyers in contingent fee cases to be paid in proportion to the results achieved which is the effect of the contingent fee agreement.

The beauty of this short article is that practically all of the citations are to federal decisions. The author points out that the contingent fee contract now is valid, enforceable and well established under federal law, which for many years was unfriendly to such arrangements.

Mr. Shipley further shows that under the contingent fee system, the United States has developed a large, highly educated, competent Bar, without equal in the world; that in America, property and civil rights are valued and preserved as in no other nation. He concludes that without the contingent fee, it is doubtful that our government would have developed in the same way, as in England, where the contingent fee is outlawed, the law is socialized.

He well says that the benefits which flow from the contingent fee far exceed any detriments that may exist; and that Bench and Bar should unite in defending the contingent fee.